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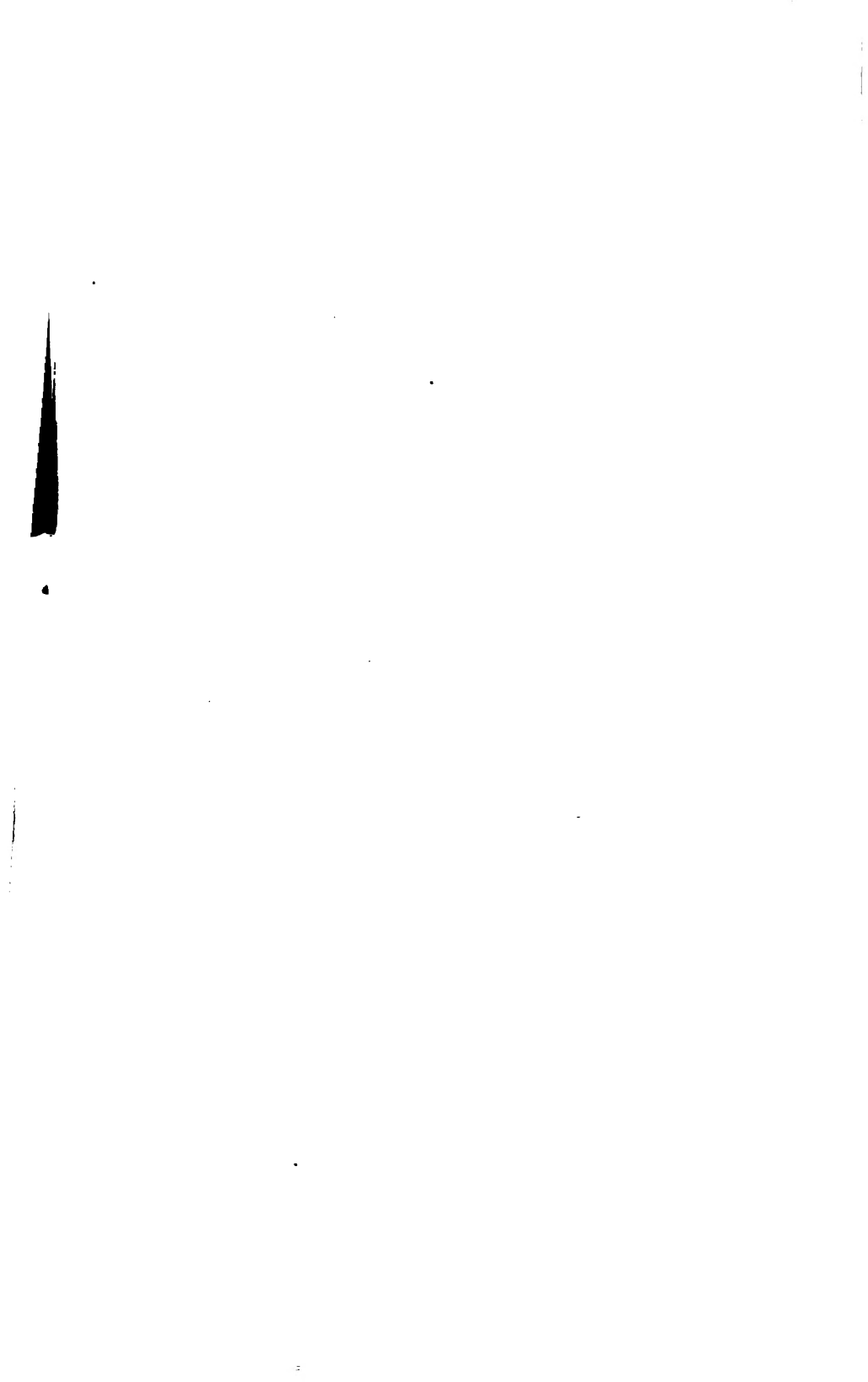
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RAY VANDERVOORT



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

C. P. POMEROY,
REPORTER.

VOLUME 150.

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ORGANIZATION OF SUPREME COURT.

[Constitution, article VI, section 2.]

SEC. 2. The Supreme Court shall consist of a chief justice and six associate justices. The Court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions hereinafter contained in relation to the Court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the Court to be heard and decided by the Court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may

convene the Court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the Court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices so assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the Court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

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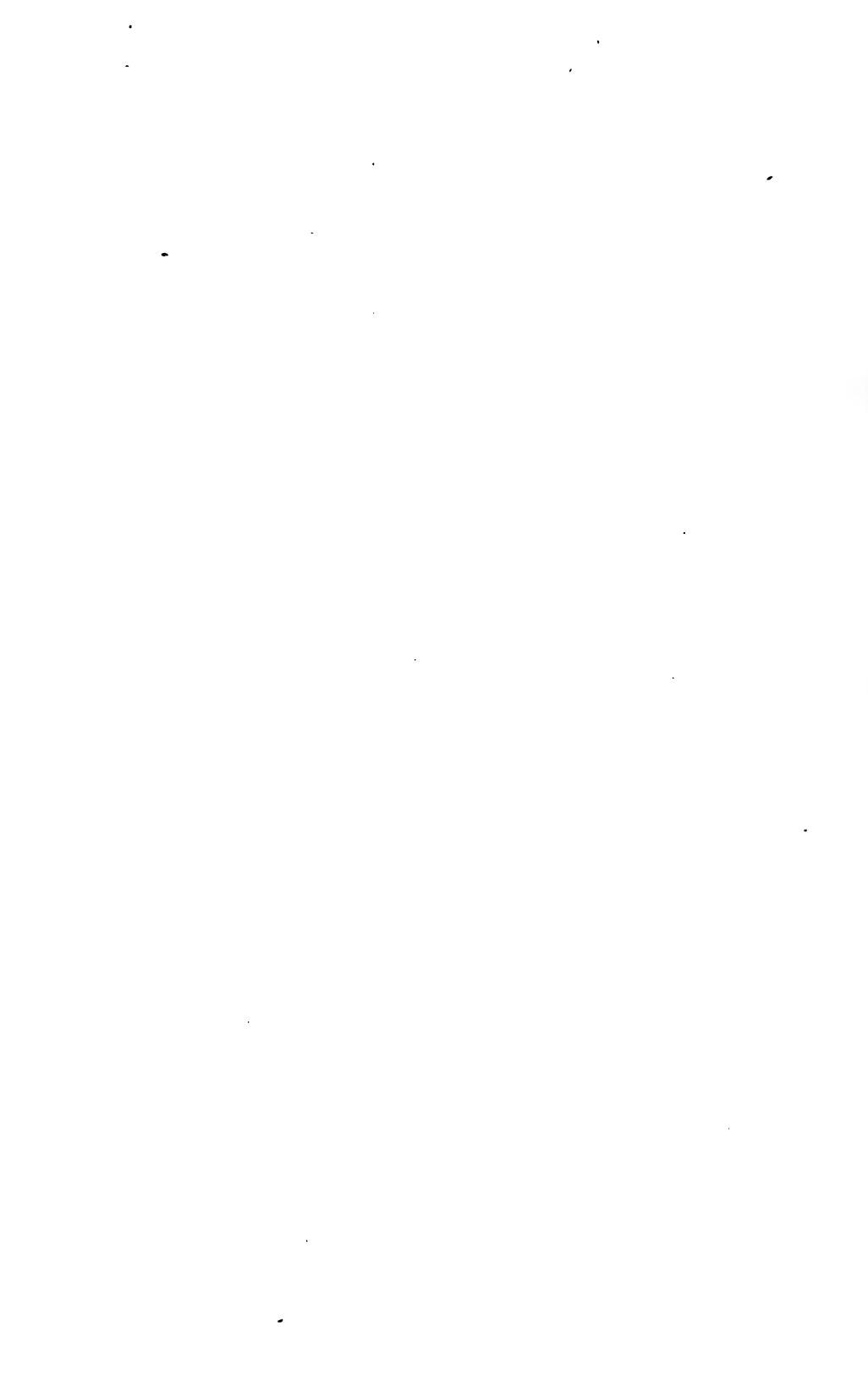
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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

[Sac. No. 1460. In Bank.—October 2, 1906.]

MATTIE Y. DOLLENMAYER, and JAMES MELLEN,
Respondents, v. **JOHN F. PRYOR,** Respondent; **JAMES**
CAESAR, Intervener, Appellant.

STATE LANDS—CONTEST—ORDER DENYING INTERVENTION—APPEAL.—In a land contest referred by the surveyor-general to the superior court, an order denying to one who claimed to be a settler upon the land in suit the right to intervene was final, and terminated the litigation as to him. He was not required to await judgment between other parties, but had the immediate right to appeal from the order after its entry.

ID.—VOID CONTEST AND REFERENCE—PROTEST OF ONE NOT A SETTLER OR APPLICANT—WANT OF JURISDICTION.—One who is not a settler upon, or occupant of, the land, or any part thereof, and who has made no application to purchase, and who does not claim or show any right, title, or interest therein, cannot by mere protest filed against the right of one who holds a certificate of purchase under an approved application for the land, as being unfit for cultivation, institute a valid contest, and an order of the surveyor-general referring such contest to the superior court is void, and gives it no jurisdiction to render any judgment of force for or against either party.

ID.—AFFIRMANCE OF ORDER FOR WANT OF JURISDICTION.—The order of intervention appealed from must be affirmed, on the ground that the court had no jurisdiction either of the action or of the intervention.

ID.—RIGHTS OF SETTLERS—SWAMP LANDS SUITABLE FOR CULTIVATION.—Under the amendment of 1899 (Stats. 1899, p. 182) swamp lands which are suitable for cultivation without reclamation can be sold only to actual settlers in tracts of one hundred and sixty acres.

APPEAL from an order of the Superior Court of Kings County. M. L. Short, Judge.

CL Cal.—1

The facts are stated in the opinion of the court.

Robert W. Miller, for Appellant.

Charles G. Lamberson, and H. P. Brown, for Plaintiffs,
Respondents.

John F. Pryor, Defendant, Respondent, *in pro. per.*

SHAW, J.—This is an appeal by James Caesar from an order of the superior court denying his application to be allowed to intervene in an action between Dollenmayer and Mellen as plaintiffs and Pryor as defendant.

The action was a land contest begun in pursuance of an order of reference from the surveyor-general, under section 3414 of the Political Code. Dollenmayer filed his application on November 28, 1903, to purchase an entire section as land not suitable for cultivation. His application was approved May 18, 1904, and a certificate of purchase was issued to him on June 18, 1904, and was thereafter assigned to plaintiff Mellen. Afterward, on July 26, 1905, Pryor filed a verified protest against the issuance of any further evidence of title under the Dollenmayer certificate, on the ground that the land was suitable for cultivation, that Dollenmayer was not a settler thereon, and that he did not make the application in good faith. Pryor demanded a trial in the courts. The order of reference was thereupon made on the day the protest was filed, and the action was begun September 24, 1905.

On August 10, 1905, after the order was made, but before suit was begun, Caesar settled on the north half of the section, which was then unoccupied, and on August 14, 1905, offered to the surveyor-general, for filing, his application to purchase the same, including therein a protest against the Dollenmayer purchase, on the ground that the land was suitable for cultivation and that Dollenmayer was not an actual settler, and demanded a trial in the courts. The surveyor-general refused to receive or file the application on the ground that he had previously made an order of reference of the contest arising upon Pryor's protest.

The complaint in intervention was presented, and leave

asked to intervene, a few days after the action was begun. It alleged, in addition to a statement of Caesar's rights, that Dollenmayer did not apply to purchase in good faith, but for the benefit of Mellen, to whom he had previously agreed to sell the land, that Pryor's protest was filed in collusion with Dollenmayer and Mellen, in pursuance of an agreement that Pryor should not appear in the action, and for the purpose of forestalling other applicants who might apply to purchase after the order of reference was made on the protest. The court refused to allow the complaint to be filed.

The respondent objects to the consideration of the appeal, contending that it is premature, and that the party asking to appeal from such an order must await final judgment between the original parties and appeal from that judgment, or, at all events, must procure the entry of a more formal judgment denying his motion, and appeal after such entry. We can perceive no merit in this objection. The record shows that the order, or judgment, denying the application to intervene was entered before the appeal was taken. It clearly shows that the court had determined the right of the intervener, and declared that Caesar should not intervene in the action, and that his proposed complaint should not be filed therein. The most verbose statement could not state the determination more accurately or effectually. So far as the intervener and his rights in that action were concerned, it was final. We see no good end to be secured by requiring him to await judgment between the other parties after a trial in which he could not participate. It ended the litigation as to him, and he should be allowed an immediate appeal. (*Stich v. Goldner*, 38 Cal. 610; *People v. Pfeiffer*, 59 Cal. 90; *Donner v. Palmer*, 49 Cal. 180.) Anything in *Wenborn v. Boston*, 23 Cal. 321, contrary to this rule, must be considered as overruled by these later decisions.

Upon the merits of the appeal, we are of the opinion that the action of the court below must be sustained, but for reasons different from those presented by respondent. It appears from the record that Pryor, upon whose protest the order of reference was made, did not therein claim to be a settler upon or occupant of the land, or any part thereof, that he made no application to purchase the same, and did

not claim any right, title, or interest therein. In the absence of statutory authority, one who does not himself claim a paramount title or right of possession to the land, or apply to purchase the same from the state, but merely protests against a proposed purchase by another, cannot, by such protest, initiate a contest before the surveyor-general against the right of the other person to purchase. Such a person has no interest to protect and no right to interfere between the proposed purchaser and the state. A mere sentimental interest, or a general interest as a citizen in the protection of state property, or in the enforcement of the state policy of selling its arable land only to actual settlers, and in limited quantities, or even the particular interest which a qualified person, privileged to purchase state lands and expecting at some future time to apply for the particular tract in question, but who is not a settler thereon, might have in preventing or delaying a prior applicant, would not be a sufficient interest to authorize such a contest. Such interests as these are not property rights. The party who raises such a contest must be one who has some proprietary interest or right of possession, an interest which he would be entitled to protect in some action or proceeding.

There are some expressions in the opinions, in *Tyler v. Houghton*, 25 Cal. 26; *Higgins v. Houghton*, 25 Cal. 259; *Thompson v. True*, 48 Cal. 606; *Cadierque v. Duran*, 49 Cal. 357; and *Cunningham v. Crawley*, 51 Cal. 131, which may seem to announce a rule contrary to this conclusion. But when considered in connection with the context and the facts of the respective cases, it will be seen that they simply lay down the rule that where one claims an interest or right of possession under the United States, or some right under the state law superior to that of the prior applicant, he may contest such proposed sale, for the purpose of protecting his superior or paramount right, and that in such a case he may do so by filing a mere protest, without himself applying to purchase the land from the state. The only case in which a different proposition from this could be claimed to have been asserted is the *Higgins* case above cited. In that case, however, the protesting persons were said to be "dwellers" upon a mining claim upon which active mining operations were going on, and upon which a large amount of money

had been expended; and although it did not appear that these parties themselves were personally asserting a claim to the mine, it was said that they had a sufficient interest to entitle them to raise the contest. This, however, was done upon the authority of *Tyler v. Houghton*, 25 Cal. 26, which decides nothing more than that one having a paramount title under the United States may contest a purchase proposed to be made from the state without himself applying to purchase. The cases cannot be taken as a precedent for the right of Pryor, who had neither possession, interest, nor claim, to inaugurate a contest before the surveyor-general.

The result is that the surveyor-general had no authority to entertain the protest of Pryor. There was in fact no contest in his office arising upon that protest, and hence the order of reference was null and gave the superior court no jurisdiction of the action. Jurisdiction in such cases exists only by virtue of a lawful order of reference, issued upon a real contest, by a party whose protest shows himself entitled to oppose the purchase. Parties cannot give jurisdiction by filing a complaint in a case where there has been no valid order of reference, nor where a reference has been made without there having been any contest to refer. The court below, therefore, had no jurisdiction of the action, no authority to render judgment of any force for or against either party, and its order denying the right to intervene must be sustained on the ground that it had no jurisdiction either of the action or the intervention.

The intervener's attention is called to the amendment of 1899 (Stats. 1899, p. 182), by which lands of this class, suitable for cultivation without reclamation, can be sold only to actual settlers in tracts of one hundred and sixty acres.

The order appealed from is affirmed.

Angellotti, J., Lorigan, J., Henshaw, J., McFarland, J., Sloss, J., and Beatty, C. J., concurred.

[S. F. No. 4609. In Bank.—October 4, 1906.]

GEORGE B. McANENY, Petitioner, v. SUPERIOR COURT OF SANTA CLARA COUNTY, and WALTER L. CROW, Receiver, Respondents.

DIVORCE—ALIMONY—RECEIVER—JURISDICTION.—The superior court has full jurisdiction to appoint a receiver in an action for divorce, either for the purpose of enforcing payment of alimony and expense money previously ordered paid, or for the purpose of enforcing a previous order requiring the husband to furnish security for such payment, or for the purpose merely of providing such security, at all times during the pendency of the action, prior to the filing of an undertaking to stay proceedings upon appeal from the order to pay alimony and costs.

Id.—STAY OF PROCEEDINGS UPON APPEAL.—A stay of proceedings upon appeal from the alimony order operates as a *supersedeas*, and deprives the superior court of all power to enforce the order appealed from, either by execution or by proceedings for contempt, or through the appointment of a receiver.

Id.—PROHIBITION — ORDER PENDING STAY OF PROCEEDINGS — ADEQUATE REMEDY—WRIT OF SUPERSEDEAS.—A writ of prohibition will not lie to prevent the enforcement of the order appealed from pending the stay of proceedings upon appeal, there being a plain, speedy, and adequate remedy in the ordinary course of law, upon a motion in this court, to stay the hand of the lower court in any proceeding to enforce the order, whether it be judicial or ministerial.

Id.—OBJECTION IN TRIAL COURT.—In such a case, objection to the jurisdiction of the trial court to appoint a receiver pending such stay of proceedings upon appeal should be first made in the trial court, upon notice to it of such stay, where there is opportunity to do so before a writ of prohibition is asked for in this court.

APPLICATION for a Writ of Prohibition to the Superior Court of Santa Clara County and Walter L. Crow, Receiver thereof. John R. Welch, Judge.

The facts are stated in the opinion of the court.

Jackson Hatch, and John E. Richards, for Petitioner.

H. E. Wilcox, and D. M. Burnett, for Respondents.

SHAW, J.—This is an original proceeding in this court for a writ of prohibition to prevent further proceedings in

pursuance of an order of said superior court made in the course of an action for divorce therein pending, wherein Mabel M. McAneny is plaintiff and George B. McAneny is defendant, appointing Walter L. Crow receiver to take charge of the property of the defendant.

Prior to the making of the order appointing Crow as receiver, the court had made an order in the action for divorce requiring the defendant, George B. McAneny, to pay certain sums of money to the plaintiff for her alimony pending the suit and for her costs and counsel fees in the prosecution thereof, and also a subsequent order for the payment of additional sums as alimony pending an appeal from the first order and for her expenses upon such appeal. From each of these orders the defendant had appealed to the supreme court and had stayed further proceedings on each order pending the appeal, by giving the necessary undertakings. The last order for alimony pending the appeal was made on February 12, 1906. Notice of the motion for the appointment of a receiver and the notice of motion for alimony, etc., pending appeal, were both served and filed on February 1st, and it was stated in the former notice that the purpose sought to be accomplished by the appointment of a receiver was the securing of the payment to plaintiff of such sums as might be directed to be paid to her for alimony, costs, and counsel fees. The order appointing a receiver was made on March 8, 1906. The court ordered that Crow be appointed receiver, and directed him, as such receiver, to take charge and custody of all the money and property of said defendant, with certain immaterial exceptions, and collect all rents, issues, and profits therefrom. This order recites the terms of the notice stating the purpose for which the receivership was desired, as aforesaid.

A writ of prohibition may be issued by this court to arrest the proceedings of any tribunal exercising judicial functions "when such proceedings are without or in excess of the jurisdiction of such tribunal." (Code Civ. Proc., sec. 1102.) By section 137 of the Civil Code, power is given to the superior court in actions for divorce to make orders requiring the husband to pay money to the wife for her support pending the action and for her expenses in prosecution or defense thereof. The orders in question, directing the payment of

money by the petitioner, were made in pursuance of the authority given by that section. By section 140 of the Civil Code it is provided that the court may require the husband to give reasonable security for making any payments which the court may direct to be made under the provisions of section 137 aforesaid, "and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case." Under these provisions a receiver may be appointed either for the purpose of enforcing payment of the alimony and expense money previously ordered paid, or for the purpose of enforcing a previous order requiring the husband to furnish security for such payment, or for the purpose merely of providing such security. (*Petaluma Bank v. Superior Court*, 111 Cal. 495, [44 Pac. 177]; *Huellmantel v. Huellmantel*, 124 Cal. 588, [57 Pac. 582]; *Sharon v. Sharon*, 67 Cal. 202, [7 Pac. 456, 635, 8 Pac. 709].)

It must be admitted that the superior court had full jurisdiction to grant the motion for a receiver at all times during its pendency, prior to the taking of the appeal from the order to pay alimony and costs and the filing of the undertaking to stay proceedings on said appeal. The stay of proceedings on the alimony order, thus effected, operated as a *supersedeas*, and during its operation deprived the superior court of all power to enforce the order appealed from, either by execution or by proceedings for contempt, or through the appointment of a receiver. (*Ruggles v. Superior Court*, 103 Cal. 127, [37 Pac. 211]; *State I. and I. Co. v. Superior Court*, 101 Cal. 150, [35 Pac. 549].) If the order appointing the receiver in this case was an act in furtherance of the enforcement of the alimony order which was stayed by the appeal, it was prohibited by the statute which in such cases forbids further proceedings upon the order appealed from and matters embraced therein (Code Civ. Proc., sec. 946), and it was, in a certain sense, in excess of the jurisdiction of the court. Notwithstanding the limited scope and purpose of the order appointing the receiver in the present case, as expressed in the notice and recited in the order, we think it was a step taken for the enforcement of the payment of the alimony and expenses allowed. (*State I. and I. Co. v. Superior Court*, 101 Cal. 150, [35 Pac. 549].) The fact that the custody is solely for the purpose of providing security does not change

the character of the proceedings. It is security for payment, so that when the final act of enforcement comes—that is, the actual appropriation of the money to the satisfaction of the demand—the money will be ready for that purpose, if enough has been secured, or the property will be in the receiver's hands for sale, if it is necessary to resort to a sale, and so it may be said to be a provision for the better enforcement of the order to pay alimony. It could have no other object than the ultimate enforcement of the payment. It is therefore a proceeding which was stayed by the undertaking for the stay of the proceedings on the order of February 12th granting further alimony and attorney's fees.

A writ of prohibition will not be issued where there is a plain, speedy, and adequate remedy in the ordinary course of law. (Code Civ. Proc., sec. 1103.) We have already seen that the proceeding to appoint a receiver was a step toward the enforcement of the alimony order appealed from, and that the effect of the stay-bond on the appeal was to stay all proceedings on the order, or in the enforcement thereof. The petitioner has therefore a speedy and adequate remedy, by means of a motion in this court, in the matter of the appeal, for a writ of *supersedeas* to stay the hand of the court below in any proceeding to enforce the order, whether judicial or ministerial. The writ of *supersedeas* "is frequently granted by this court for the purpose of staying proceedings in the superior court, when a review of the action of that court is sought in this court, either upon direct proceeding or on appeal, and is directed to the court whose action is under review, or to an officer of that court who may be about to enforce its judgment. . . . If, after such appeal, the court below seeks to enforce its judgment, this court will grant a special order restraining its action." (*Dulin v. Pacific W. and C. Co.*, 98 Cal. 304, [33 Pac. 123].) Such writs have been issued in the following cases: *Hoppe v. Hoppe*, 99 Cal. 537, [34 Pac. 222]; *Painter v. Painter*, 98 Cal. 626, [33 Pac. 483]; *Born v. Horstmann*, 80 Cal. 452; *Baldwin v. Superior Court*, 125 Cal. 584, [58 Pac. 185]; *Anderson v. Anderson*, 123 Cal. 445, [56 Pac. 61]; *Brown v. Rouse*, 115 Cal. 619, [47 Pac. 601]; *Hubbard v. University Bank*, 120 Cal. 632, [52 Pac. 1070]. This court has even gone so far, upon the granting of a writ of *supersedeas*, as

to quash writs already issued out of the superior court and vacate sales already made in pursuance of the order of that court. (*Owen v. Pomona L. and W. Co.*, 124 Cal. 331, [57 Pac. 71].) This remedy is more effectual and comprehensive than prohibition in all cases where, as in this case, the acts of the party restrained are proceedings which are stayed by an appeal. The petitioner is also the appellant, and therefore has the right to apply for a *supersedeas* in aid of his appeal. We are aware that this court has sometimes granted relief by way of prohibition where the exercise of judicial functions was threatened in enforcement of the judgment stayed by an appeal. In the leading case of *Havemeyer v. Superior Court*, 84 Cal. 342, [18 Am. St. Rep. 192, 24 Pac. 121], the persons applying for the writ of prohibition were not parties to the action. It was considered doubtful whether they had the right to appeal, and, if so, whether the appeal would be of any value without a bill of exceptions, and hence that remedy was not deemed plain or adequate. Not being parties, they could not move for a *supersedeas*. In the case of *State I. and I. Co. v. Superior Court*, 101 Cal. 150, [35 Pac. 549], and in other cases where prohibition has been entertained at the instance of a party to the appeal, the existence of the remedy by writ of *supersedeas* does not appear to have been called to the attention of the court, and the effect of such remedy has not been discussed in the opinion.

There is also the remedy by appeal, by which the order can be vacated for mere error as well as for excess of jurisdiction. The defendant has appealed from the order appointing the receiver, and in his petition he seeks to show that this remedy is ineffectual because the amount of the undertaking to stay proceedings thereon has been fixed at thirty thousand dollars, and he avers that he is wholly unable to procure sureties for that sum. This allegation is denied in the answer, and, as the case has been submitted without a trial of the issue thus raised, we cannot decide whether or not this remedy is plain or adequate in this particular case.

Another objection to the sufficiency of the case made by the petitioner is that it does not appear that the objection to the jurisdiction of the court was ever brought to the attention of the superior court and an opportunity given to

that court to recede from its position, a step which is usually a condition precedent to the right to a writ of prohibition in this court. There was not here, as in *Havemeyer v. Superior Court*, 84 Cal. 403, [18 Am. St. Rep. 192, 24 Pac. 121], a lack of opportunity to do so, nor is there anything in the record to show that the disposition of the lower court to persist in its course made it useless to object. The proceeding for a receiver was initiated at the same time as the application for additional alimony, and the court, as before stated, had full jurisdiction to proceed at all times prior to the appeal from the alimony order and the securing of the stay of proceedings thereon. The appeal from the alimony order was taken, and the stay of proceedings thereon obtained, on February 14, 1906. The application for a receiver was postponed from day to day by stipulation of the attorneys, and did not come on for hearing until March 8, 1906, at which time it was granted. There was therefore ample opportunity given to the petitioner to object to the jurisdiction of the court and to give notice to the court of the fact he had taken the appeal and obtained a stay of proceedings. It does not appear that the superior court was ever informed of the filing of the undertaking which operated to stay proceedings. Unless it was aware of that fact it could have no knowledge that it was proceeding in excess of its power. This case therefore does not come within the exceptions or qualifications to the rule, that objection must be made in the lower court, which are noted in the opinion in *Havemeyer v. Superior Court*, 84 Cal. 403, [18 Am. St. Rep. 192, 24 Pac. 121].

The petition is denied.

McFarland, J., Angellotti, J., Sloss, J., Henshaw, J., and Lorigan, J., concurred.

[Crim. No. 1283. In Bank.—October 8, 1906.]

THE PEOPLE, Respondent, v. LEON SOEDER, Appellant.

CRIMINAL LAW — MURDER — MOTIVE—COLLECTING INSURANCE MONEY—

DESIRE FOR ELIGIBLE MARRIAGE—LETTERS.—When the evidence is sufficient to show that the homicide was committed by defendant for the purpose of collecting insurance money obtained by him on the life of the deceased, with the desire to commend himself as eligible for marriage with a young woman to whom he had represented that he was heir to an estate in an amount equal to the amount of such insurance, letters addressed to her stating that he would shortly come into such estate, and would be a wealthy man, were admissible upon the question of motive for the defendant for the crime committed.

ID.—LIFE POLICY PAYABLE TO FOREIGN SISTER—HANDLING OF PROCEEDS.

—The fact that the defendant had taken only an accident policy in his own name upon the life of the deceased, and had taken a life policy thereupon in the name of a sister of the defendant, who, according to defendant's statement, was the wife of the deceased, does not prevent the insurance policy taken in her name from being evidence of motive, where it is apparent that he expected to handle the proceeds thereof.

ID.—TESTIMONY OF CELLMATE FOR PROSECUTION — CONFESSION BY DEFENDANT—ACTION BY JUDGE—DEFENDANT NOT PREJUDICED.

—Though the trial judge is rigorously prohibited from action or word having the effect to convey to the jury his personal opinion as to the truth or falsity of any evidence, yet where a cellmate of the defendant had testified for the prosecution to a confession of the murder made to him by defendant, for the purpose of obtaining the insurance, it was not error for the court to elicit from the witness that he understood that the defendant was charged with murder, the penalty for which might be death, and to inform him, without intimating either way that his testimony was true or false, that "any person who by willful perjury secures the conviction and execution of any innocent person is punishable by death," and to elicit from him that, with that knowledge, he had no desire to change or correct his testimony.

ID.—EFFECT OF ADHERENCE TO TESTIMONY—PROVINCE OF JURY.

—The fact that the effect of the adherence of the cellmate to his testimony in the face of the information as to the penalty for willful perjury resulting in the conviction of an innocent person, was to strengthen that testimony in the minds of the jurors, was due solely to the fact that the jurors knew that he was testifying with that knowledge; and it was proper for them to know this fact and to take it into consideration with all other matters going to the credibility of the witness, in determining the weight to be given to his testimony.

ID.—CROSS-EXAMINATION OF DEFENDANT—QUESTIONS NOT PREJUDICIAL—TESTING CREDIBILITY—CONVICTION OF FELONY.—Where the defendant voluntarily testified in his own behalf he became subject to the same rules of cross-examination for testing his credibility thereon as any other witness. When he denied that he committed the murder, he was properly asked on cross-examination where he was on that night at the hour of the death; and it was competent for the prosecution to show upon his cross-examination that he had been before convicted of a felony.

ID.—ARGUMENT OF DISTRICT ATTORNEY.—It is not misconduct for the district attorney in his argument fully to state his views as to what the evidence shows and as to the conclusions to be fairly drawn therefrom.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Carroll Cook, Judge.

The facts are stated in the opinion of the court.

Edward S. Salomon, and Alex. Campbell, for Appellant.

U. S. Webb, Attorney-General, C. N. Post, Assistant Attorney-General, Lewis F. Byington, District Attorney, and J. Charles Jones, for Respondent.

ANGELLOTTI, J.—The defendant was charged by information filed in the superior court of the city and county of San Francisco with the crime of murder, alleged to have been committed on January 10, 1904, by the unlawful killing of one Joseph Blaise, and having been convicted of murder in the first degree and adjudged to suffer death, appeals from the judgment and from an order denying his motion for a new trial.

There is not, and could not well be, upon the record before us, any claim that the evidence adduced on the trial was insufficient to support the verdict, and it will therefore be unnecessary to state the evidence, except in so far as is essential to a proper understanding of the points made for reversal.

Between eight and nine o'clock A. M. on January 11, 1904, the body of Blaise was found lying on the west side of Taylor Street, between Vallejo and Green streets, in the city of San Francisco. The evidence afforded by the condition of the

body and of the ground where it lay was clear and convincing to the effect that Blaise had been foully murdered at that place the evening before, by being first struck down from behind with some blunt instrument, and then killed by a knife driven into and drawn clear across the throat, severing the carotid artery and jugular vein. The spot where the body was found was a lonely place, Taylor Street at Vallejo Street running over the brow of Russian Hill, and between Vallejo and Green streets being a very steep grade without sidewalk and without a house on either side. No one witnessed the killing, and the state was therefore without direct evidence as to the identity of the murderer.

Blaise, according to the statements of defendant, was the husband of defendant's sister, who lives in Germany, and has never been in this country. He was apparently a laborer and without means, and at the time of his death had been in the United States only about six weeks, and in San Francisco for less than a month, having left his home in Germany with defendant in November, 1903. He was entirely without knowledge of the English language. On January 7, 1904, defendant had succeeded in obtaining two policies of insurance on the life of Blaise, one of which was an accident policy for three thousand dollars, payable to defendant, and the other of which was an ordinary life policy for three thousand dollars, payable to defendant's sister, who, as already stated, was in Europe. The theory of the prosecution was that the defendant, who had lived in this state for several years, went from California to Germany for the purpose of bringing Blaise to this country, so that he might then insure his life here, and subsequently kill or otherwise dispose of him, in order to obtain the insurance money, and that in pursuance of this plan he did bring Blaise from his home in Germany to San Francisco and there obtained insurance on his life, and then lured him to this lonely spot on Russian Hill and there killed him, so that he might realize on the investment he had made. Difficult as it is to conceive of a human being so constituted that he could deliberately make and carry into execution such a plan, the evidence sufficiently supports the theory above stated.

1. A portion of the evidence introduced by the prosecution in support of this theory consisted of certain letters written

by defendant to a young woman in San Francisco. The admission of these letters in evidence over the objection of defendant is claimed to have constituted prejudicial error. It is urged that the letters are of such a character that they must have prejudiced the jury against the defendant. This, of course, would be no sufficient objection to their being received in evidence if they were relevant to any material fact in issue. Evidence having a direct tendency, in view of the surrounding circumstances, to prove motive on the part of a person for a crime, and thus to solve a doubt "either as to identity of the slayer, the degree of the offense, the insanity of the defendant, or to the justification or excusability of his act," is admissible against a defendant, however discreditably it may reflect on him, and even where it may show him guilty of other crimes. (See *People v. Cook*, 148 Cal. 334, [83 Pac. 43, 46, 50]; *People v. Suesser*, 142 Cal. 354, 363, [75 Pac. 1093].) In *People v. Brown*, 130 Cal. 591, 594, [62 Pac. 1072], this court, quoting approvingly from *People v. Stout*, 4 Park. C. C. (N. Y.) 128, said: "Whatever fact tends legitimately and fairly, according to the ordinary operation of the human mind and the ordinary principles of human conduct, to show motive, may properly be given in evidence in proof of any assumed motive for the commission of the crime." Evidence as to a motive for the killing on the part of the defendant is peculiarly material in a case where the identity of the party who committed the crime is a fact in dispute, though, as we have seen, the rule as to its admissibility does not confine it to such cases. (See *People v. Cook*, 148 Cal. 334, [83 Pac. 43, 46, 50].)

We have no doubt that the letters admitted in evidence in this case were admissible upon the question of motive. The evidence of the young woman to whom they were written showed that from April, 1903, to the time of his departure for Germany, on October 16, 1903, defendant had been most anxious to win her favorable regard, and especially desirous of showing to her that he was possessed of money. He had been assiduous in his attentions, and had made her presents of articles aggregating several hundred dollars in value, and had also represented to her that money had been bequeathed to him by an uncle in Germany, which he would shortly obtain, and that he would be a wealthy man. He left Cali-

fornia on October 16, 1903, with the purpose avowed to her of obtaining a portion of the money given to him, telling her that the lowest sum he would come back with would be ten thousand dollars, which sum, it may properly be noted in passing, was the exact amount of life insurance that defendant sought to obtain on the life of Blaise, the insurance companies applied to refusing to issue a policy in such a large amount. The letters introduced in evidence, eight in number, were written by defendant between the time of his departure and January 1, 1904, several having been written in New York and France, and at least three in San Francisco after his return. This series of letters, the last of which was mailed December 29, 1903, unmistakably shows that defendant for some reason was most desirous of marrying the young woman, and also that he was satisfied that it was essential to the accomplishment of this that he should immediately obtain a considerable sum of money from some source, and that it would be useless to persist in further attentions, or even to see her, until such money was obtained. It throws some light upon the question as to the ultimate object of the earnest efforts of defendant to obtain insurance in large amounts upon the life of Blaise, indicating an object the accomplishment of which—viz. the immediate obtaining of the insurance money—necessarily included the death of Blaise or his disappearance under such circumstances as to make sufficient proof of death possible. It had a direct tendency to show a motive on the part of defendant for the doing of that which would make the insurance policies payable, as he undoubtedly believed the death of Blaise would do, and thus to show a motive on his part for the killing of Blaise.

While the effect in this behalf of the first seven letters may have been somewhat impaired by the last letter, written December 29, 1903, wherein defendant reproaches the young woman for not having answered any of his letters or sent him any word or come to see him, all because he had disappointed her in not sooner procuring money, and declares the engagement broken, and demands a return of his presents, such effect was not destroyed thereby. The letter was of such a character that it certainly cannot be held that it shows, as a matter of law, that defendant had given up all

desire or hope of winning the hand of the young woman, or that he did not feel that with money in his possession he could still obtain her.

It is suggested that as the life policy was payable to the wife of Blaise, defendant could not derive any benefit therefrom, and there was therefore, so far as such policy was concerned, no possible motive on his part for the killing of Blaise. This suggestion, however, is practically without force when we remember that this wife, if there was such a person, was, according to the testimony, the sister of defendant, and a resident of a country thousands of miles away. In the light of all the facts, it is apparent that defendant expected to himself handle the proceeds of such policy. It must also be borne in mind that we have nothing except the statement of defendant, acquiesced in by Blaise when alive, to show that Blaise was the brother-in-law of defendant, or that he had a wife at all.

2. One Cooper, who was a cellmate of defendant in the county jail while defendant was confined there awaiting trial, and who testified that he had known defendant prior to the killing of Blaise, gave testimony to the effect that the defendant had admitted to him that he killed Blaise for the purpose of obtaining the insurance, and had, with the aid of a pencil drawing which defendant himself admittedly made, given him a detailed statement of the locality where and the manner in which the crime had been committed. He further testified that defendant had asked him to assist in establishing an *alibi*. After Cooper had concluded his testimony, the court asked Cooper if he understood that the defendant was charged with murder and that the punishment for murder in the first degree might be death, and Cooper answered in the affirmative. The court then said: "Now, the court has no desire or intention of intimating in either way that your testimony is true or that it is false, but that you may have an opportunity of correcting the same, if any be untrue, I inform you that under the law of this state any person who by willful perjury secures the conviction and execution of any innocent person is punishable by death. With the knowledge of the punishment attached in such case, have you any change or correction to make in your testimony?" The witness answered in the negative.

The district attorney then asked, "You have no change or correction to make?" and Cooper answered, "None." This occurred in the presence of the jury. No objection or intimation that the same was not entirely satisfactory was made by defendant in regard to any of these questions, and no exception was taken to the action of the court or district attorney in the matter.

It is now urged that the court had no right to pursue this course of examination, for the reason that it thereby intimated to the jury an opinion on the part of the court as to the truth or falsity of Cooper's evidence, and also that it was prejudicial to the accused, as it left with the jury the impression that the witness had testified truthfully.

Under our system the trial judge is rigorously prohibited from action or words having the effect of conveying to the jury his personal opinion as to the truth or falsity of any evidence. The determination of questions of fact must be made by the jury free from the influence that knowledge of the trial judge's views thereon might have. If there was anything in the action complained of that would have the effect of intimating to the jury views on the part of the court as to Cooper's evidence which were adverse to defendant's interests, defendant would have good ground for complaint.

We are, however, unable to see therein any intimation on the part of the court of an opinion unfavorable to the defendant and in favor of the evidence given by Cooper. If, despite the court's express disavowal of an intent to intimate either way as to the truth or falsity of the evidence given by Cooper, the statement made and questions asked by the court had the effect of conveying any intimation of opinion on its part, such intimation was that the court was inclined to doubt the truth of the evidence, rather than to believe it. If it had been otherwise, there could have been no occasion for making the statement and asking the questions, for certainly it could not have been and cannot now be assumed by any one from the nature of the statement and questions, that it was the desire of the court thereby to fortify and emphasize the evidence given by the witness. It may be that the necessary effect of the statement and questions was to intimate a doubt on the part of the court as to the truth of the evidence given by Cooper, but in this there could be no

intimation unfavorable to defendant, and he, therefore, cannot complain. So far, therefore, as the remarks and questions of the court are concerned, there was no intimation of opinion upon the part of the court that can be held to have been misconduct prejudicial to defendant's rights. It is unnecessary to here determine whether the objections now made in this matter can be considered without objection made or exception reserved in the trial court.

We see no merit whatever in the objection that the effect of the adherence to his testimony by Cooper, in the face of the information given him by the court as to the penalty for willful perjury resulting in the conviction and execution of an innocent person, was to strengthen that testimony in the minds of the jurors. If such was the effect, which may be conceded, it was due solely to the fact that the jurors knew that the witness was testifying with actual knowledge as to the penalty prescribed by law for perjury. This it was entirely proper for them to know and take into consideration, with all other matters going to the question of credibility of the witness in determining the weight that should be given to his testimony.

We are unable to see any merit in the contention of defendant relative to the incident we have been discussing. Everything done by the court was in furtherance of the ultimate object of every judicial investigation—viz. the eliciting of the truth; there was therein no intimation of opinion on the part of the court adverse to defendant's interest; and the only effect thereof was to bring to the attention of the jury a fact which it was proper for them to know in determining the weight to be given to Cooper's evidence.

3. Many rulings of the trial court overruling objections to questions asked the defendant on his cross-examination by the district attorney are complained of, it being claimed that such questions were not proper cross-examination, for the alleged reason that they had no reference to matters about which he was examined in chief. (Pen. Code, sec. 1323.)

Defendant had testified very fully on his direct examination as to his conversations with Cooper in the county jail, denying the truth of Cooper's statements, and, testifying explicitly in regard to the diagram made by him showing the place of the homicide, said that he told Cooper at the time that he

knew nothing about the place or its whereabouts of his own knowledge, and that he was drawing the diagram solely from his own recollection of a map that had been produced in the police court. This was in direct conflict with the evidence of Cooper as to the conversations between them upon this subject. Several of the questions asked on cross-examination of the defendant were devoted to an effort to show by him that he did, at the time of the conversation with Cooper, know from personal observation as to the whereabouts and character of the place. It may be strongly argued that this was legitimate cross-examination upon a matter concerning which he had been "examined in chief,"—viz. his conversation with Cooper,—for the reason that any answers to the questions asked which tended to show such personal knowledge on his part would impair the force of his direct testimony as to what his statements to Cooper were in this regard, and therefore would be legitimate cross-examination within the rule laid down in *People v. Gallagher*, 100 Cal. 466, 475, [35 Pac. 80]. It is not necessary, however, to decide this point, in view of the answers given by the defendant to the questions. By those answers he steadfastly denied any personal knowledge as to these matters, and the evidence elicited was of such a nature that prejudice could not have been suffered by defendant on account of such cross-examination.

Outside of the testimony as to the Cooper conversations, defendant had testified on his direct examinations simply as follows: "I did not kill my brother-in-law, Joseph Blaise. I never employed or tried to employ any one to, or make any combination or agreement with anybody to kill him." On cross-examination he was asked: "Where were you on the night of January 10th of this year at the hour of nine o'clock?" This time, according to the evidence, was about the time of the commission of the murder. This undoubtedly was legitimate cross-examination as to the general statement made by defendant on his direct examination, to the effect that he was not the person who had committed the murder. (See *People v. Gallagher*, 100 Cal. 466, 475, [35 Pac. 80].)

The defendant, having voluntarily testified in his own behalf, became "subject to the same rules for testing his credibility before the jury by impeachment or otherwise, as any other witness" (*People v. Hickman*, 113 Cal. 80, 86,

[45 Pac. 175]), and it was therefore competent for the prosecution to show either by his cross-examination or the record of the judgment that he had theretofore been convicted of a felony. (Code Civ. Proc., sec. 2051; *People v. Arnold*, 116 Cal. 682, 687, [48 Pac. 803]; *People v. Sears*, 119 Cal. 267, 271, [51 Pac. 325]; *People v. Meyer*, 75 Cal. 383, 386, [17 Pac. 431].) The rulings of the court upon this point were therefore not erroneous.

The usual contention is made that the district attorney in his closing argument to the jury went beyond the limits of legitimate argument to the prejudice of the defendant. We find no support for this contention in the record. This is not a case like that of *People v. Cook*, 148 Cal. 334, [83 Pac. 43], where the district attorney stated as a fact something most prejudicial to the defendant, as to which there was absolutely no intimation in the evidence. As was said in *People v. Romero*, 143 Cal. 458, 460, [77 Pac. 163, 164], "Counsel has the right in the argument to fully state his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom." In the case at bar the district attorney, in our judgment, did no more than this.

The transcript on appeal discloses no other point requiring discussion.

The judgment and order denying the motion for a new trial are affirmed.

Shaw, J., Hall, J., Henshaw, J., Lorigan, J., and Sloss, J., concurred.

NOTE.—Justice Hall, of the district court of appeal, participated in the hearing and determination of this case in the place of Justice McFarland.

[L. A. No. 1657. Department One.—October 11, 1906.]

LOS ANGELES AND REDONDO RAILROAD COMPANY
et al., Respondents, v. NEW LIVERPOOL SALT COM-
PANY, Appellant.

LEASE—OPTION TO PURCHASE—CONSTRUCTION—EXCLUSION OF EXCEPTED
AREA—EASEMENT.—A lease by a railroad company of land for

salt works, saving and reserving from the leased premises its railroad track and a space twenty feet in width on either side of the center of the track, and granting an option to purchase the leased premises for a fixed price, does not include within said option any part of the excepted area, and such exception cannot be construed to be merely the reservation of an easement over a part of the leased premises.

ID.—MISTAKE IN DEED—REFORMATION—PLEADING AND PROOF.—Where, by mistake in the deed executed under the option, the excepted area was included therein, it is immaterial whether the mistake was mutual or a mistake of the plaintiff, known or suspected by the defendant; and where the mistake was alleged in each form, the plaintiff was entitled to reformation of the deed upon sufficient proof of either.

ID.—CARELESSNESS IN FAILING TO READ DEED.—The mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly. Such carelessness does not constitute a neglect of legal duty, within the meaning of section 1577 of the Civil Code; and the conditions on which the contract may be reformed, specified in section 3399 of the Civil Code, do not require the refusal of relief because the party asking it might have discovered the mistake before signing.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial.
D. K. Trask, Judge.

The facts are stated in the opinion of the court.

Purcell Rowe, and J. S. Chapman, for Appellant.

Borden & Carhart, for Respondents.

SHAW, J.—This is an action to correct a mistake in a deed executed by the plaintiffs to the defendant. The plaintiff Redondo Improvement Company was merely a nominal party to the deed as well as to this action. In mentioning the plaintiff in this opinion we refer only to the railroad company.

The mistake alleged to have been made consisted of the failure to insert in the description of the property an exception which, if inserted, would have excluded from the description certain territory otherwise embraced within the lines of a tract described in the deed by metes and bounds. The court found that the mistake was made as alleged, and gave

judgment for the reformation of the deed as prayed for. The principal contention upon the appeals, which are taken from the judgment and from the order denying a new trial, is that the evidence does not sustain the finding or judgment.

In July, 1901, the plaintiff executed to the defendant a lease, for the term of seven years, upon certain described property. The lease contained a clause to the effect that at any time during the term the defendant, at its option, might purchase of the plaintiff the leased premises for the price of twelve thousand five hundred dollars. In May, 1902, the defendant elected to buy the property in pursuance of the option. The deed in controversy was executed in compliance with the obligation to convey, which, by the exercise of the option, became operative and binding upon the plaintiff. There is no pretense on the part of the defendant that there was any new or additional agreement or modification of the old agreement, whereby the plaintiff became bound to convey any other property, or greater quantity of land, than was embraced in the option.

The claim of the defendant is that there was no mistake; that the option covered the entire tract of land, including that reserved or excepted from the description in the lease, and that it was therefore in precise accord with the intention of the parties and that it was necessary, in order to comply with the option agreement, that the space of ground reserved from the operation of the lease should be conveyed to the defendant upon the exercise of the option; and that the exception, or reservation, which constituted part of the description in the lease, was purposely and properly omitted from the deed. Unless this construction of the option contract is correct, there can be no doubt that there was a mistake, and that the evidence amply supports the findings and judgment.

We are of the opinion that the option cannot be so construed.

The description of the land leased is as follows: "Situate at Redondo Beach in the county of Los Angeles, state of California, and being a portion of the property known as and called the 'Pacific Salt Works Tract,' a portion of said tract hereby leased being more specifically delineated and described upon the blue print hereunto attached and made a part hereof, the said leased premises being inclosed in red

lines upon said annexed blue print and consisting of two parcels, the larger of which contains, as shown upon said blue print, 17.07 acres of land and the smaller of said parcels, as shown upon said blue print, containing 2.31 acres of land; saving and reserving from the said *leased premises* that portion thereof lying between the tracks of the Los Angeles & Redondo Railway Company, as shown on said blue print, and also saving and reserving a strip of land twenty feet in width, being ten feet on either side of the center line of said railroad tracks as the same are now constructed, excepting, however, such portion of said twenty-foot strip so reserved as is at the date of this indenture occupied by the building or vats of the said lessee."

The option clause, so far as material, is in these words: "It is further agreed that at any time during the existence of this lease the said lessee . . . shall have, and it is hereby granted an option to purchase the said *leased premises*, at the price of \$12,500 to be paid in gold coin of the United States at the date of the conveyance of said real property unto said lessee by said 'lessor.'" (The italics in both clauses are our own.)

The claim of the defendant that the term "leased premises," in the option clause, was therein used in the same inaccurate sense which appears to have been given to it where it is used in the reservation clause in the description, and, consequently, that the option covered the entire area inclosed in the red lines, including the railroad tracks, is shown to be untenable by the context, the surrounding circumstances, and the conduct of the parties, as well as by the natural meaning of the words. Conditions in the lease require the lessee to "maintain on said leased premises" the present salt plant, and also require of the lessee a certain method of operation of the "leased premises," and provide that upon a breach of the conditions the lessor may resume possession of the "leased premises." In each of these instances the phrase does not embrace the excepted area. The lessee did not take possession of the railroad tracks, and claimed no right to do so until long after the execution of the deed in question, and the lessor operated the tracks continuously during the whole of the intervening period. The short section of the tracks included within the red lines

was but a small part, in length, of the spur tracks of the plaintiff, and was absolutely necessary to the use of the part extending beyond these lines, and which would be cut off from connection with plaintiff's main line if plaintiff were prevented from crossing the land with its cars. Its traffic over these spur tracks was important and valuable. The short pieces of track within the red lines would be of no substantial value to the defendant. The saving clause in the description is not a reservation of an easement merely over a part of the leased premises. Its effect is to save and except from the operation of the lease the fee of the area between the tracks and for ten feet on each side of the center thereof, and hence the lease did not transfer any estate in that part of the space inclosed in the red lines. That space formed no part of the leased premises, and was not covered by the option clause giving the right to purchase the premises actually leased. (*Sears v. Ackerman*, 138 Cal. 586, [72 Pac. 171]; *Butler v. Gosling*, 130 Cal. 422, [62 Pac. 596].)

There is therefore no foundation for the defendant's contention that the evidence is insufficient to prove a mistake in the preparation and execution of the deed. It is not important to determine whether it was a mutual mistake or a mistake of plaintiff alone, known or suspected by the defendant. The complaint was in two counts, and alleged the mistake in both forms. If either was proven the plaintiff was entitled to the relief given.

There is no merit in the objection that the mistake was due to the forgetfulness of the attorneys and officers of the plaintiff who drew and executed the deed, or by their neglect in failing to compare the description in the deed as prepared with that in the lease.

The course of decision in this state has not been entirely consistent on the general subject of the effect of neglect as a reason for refusing relief in equity. The decisions in *Hawkins v. Hawkins*, 50 Cal. 558; *Senter v. Senter*, 70 Cal. 619, [11 Pac. 782]; *Metropolitan L. A. v. Esche*, 75 Cal. 513, [17 Pac. 675]; and *Crane v. McCormick*, 92 Cal. 181, [28 Pac. 222], are cited by defendant as authority for the proposition that a written contract will not be reformed in equity on the ground of mistake, at the instance of a party who

neglected to read the instrument, when he had a full opportunity to do so before its execution, and the defect is of such a character that he could easily have discovered it if he had read it with attention. The cases do not sustain the proposition to the full extent necessary to its application to the present case, although some expressions might seem to go so far as that. *Hawkins v. Hawkins* was criticised and explained in *Wilson v. Moriarity*, 88 Cal. 213, [26 Pac. 85]. It was not technically a suit to correct a mistake in the written contract, for the sale of the grain in question. It was an action to cancel the writing and to recover a balance due on the alleged previous verbal contract of sale. The preliminary statement of facts made by the reporter, if correct, would seem to make a clear case of mistake of one party known to the other, in which case, under the principles stated in sections 3399 and 3402 of the Civil Code, the plaintiff might have had the written contract corrected, and might have recovered the balance that would be due according to its terms as revised. Such relief was not asked, and the opinion, which is very general in its terms, seems to treat the cause of action as one founded upon alleged fraud, and applies the principle that, before entering into a contract, one must use the opportunities open to him to discover the facts affecting it, and if he negligently fails to do so, he cannot obtain relief from the fraud which by his neglect he suffered to be practiced upon him. It does not hold that the failure to read a contract with sufficient care to perceive a mistake in its terms, will of itself prevent relief by way of a correction of the mistake. In *Senter v. Senter* the mistake as to the description of the land was induced by false statements of the defendant to plaintiff concerning the same, and it was held that the plaintiff was entitled to have the correction made. *Hawkins v. Hawkins* is cited, and is declared to be not in point. In *Metropolitan L. A. v. Esche*, the alleged mistake was made by sureties in a bond for the performance by the principal of certain duties to the obligee during a term of office. The obligee was not aware of any mistake on the part of the sureties, and accepted the bond and allowed the principal to continue in its service upon the faith of it. There was therefore neither mistake nor fraud of which the sureties could

complain. *Crane v. McCormick* was a similar case, but the facts were declared not to make out a case of mutual mistake.

It has been frequently decided that the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly. In *Higgins v. Parsons*, 65 Cal. 280, [3 Pac. 881], the plaintiff signed a contract believing that it contained a certain stipulation agreed on. The defendant knew that it did not contain the stipulation, and also knew that the plaintiff believed that it did. The plaintiff had an opportunity to read the contract before signing. It is said that the conditions on which a contract may be reformed are specified in section 3399 of the Civil Code, and that, as that section does not authorize the refusal of such relief because the party asking it might have discovered the mistake before signing, the court is not at liberty to exact such diligence as a condition. Perhaps the court there should have added that the carelessness did not constitute a neglect of legal duty, within the meaning of section 1577 of the Civil Code. In *Wilson v. Moriarity*, 88 Cal. 213, [26 Pac. 85], it was held that the neglect of the plaintiff, when the lease was read to her by the notary, to pay sufficient attention to discover that it was for ten years, instead of five years, as she supposed, was not sufficient to defeat her action for its reformation in that particular. In *Sullivan v. Moorhead*, 99 Cal. 159, [33 Pac. 796], the deed was executed in compliance with a previous contract of sale, and in that respect it was similar to the case at bar. The contract was for the sale of lots 10, 11, 12, and 13 in a certain block. The deed described the land as lots 10, 11, 12, and "a part of 13." The plaintiff read the deed, but did not observe the variance. The court said: "The fact of his having read the instrument would not prevent the court from finding that it was made under a mistake." There are many authorities from other states to the effect that a written contract will be corrected in equity, although the mistake was patent on the face of the document, and could have been discovered if read with attention. (*Albany C. S. I. v. Burdick*, 87 N. Y. 46; *Story v. Gammell*, 68 Neb. 709, [94 N. W. 982]; *Andrews v. Gillespie*, 47 N. Y.

487; *San Antonio v. McLane*, 96 Tex. 48, [70 S. W. 201]; *Kelley v. Ward*, 94 Tex. 289, [60 S. W. 311]; *Loyd v. Phillips*, 123 Wis. 627, [101 N. W. 1092]; *Taylor v. Glen Falls I. Co.*, 44 Fla. 273, [32 South. 887]; *Kilmer v. Smith*, 77 N. Y. 226, [33 Am. Rep. 613]; *Snyder v. Ives*, 42 Iowa, 162.)

There was, it is true, some negligence on the part of the plaintiff in the case at bar. But it was an inadvertence of a character which will sometimes occur in the conduct of men of prudence and caution. The plat and lease were sent to an abstract company by plaintiff's attorney with instructions to prepare a certificate of title and also a description for insertion in the deed. This was done, and the description, written on a slip of paper, was returned to the attorney, but in some way not explained the exception mentioned in the lease was not inserted therein. It was copied into the deed by the typewriter in this erroneous form. The attention of all the parties was particularly directed to other features of the transaction and to other parts of the description, the omission of the exception clause was not observed by any of them, and all signed the deed believing that the description therein was the same as in the lease. The negligence was not so gross as to constitute a neglect of legal duty, or forfeit the right of either party aggrieved to relief from the mistake.

The judgment and order denying a new trial are affirmed.

Angellotti, J., and Sloss, J., concurred.

[Sac. No. 1358. Department One.—October 11, 1906.]

DAVID M. FLEMING, Respondent, v. ANNIE HOWARD
et al., Appellants.

ACTION TO ESTABLISH WAY—PRESCRIPTIVE TITLE—CONFLICTING EVIDENCE.—In an action to establish a way resting upon a title by prescription, where the court found for the plaintiff, and there was evidence for the plaintiff to the effect that the way across defendants' land had been used in connection with plaintiff's land continuously and without interruption for thirty-one years, and that it was adverse in its inception, a *prima facie* title by prescription

was established; and the conclusion of the lower court against the credibility of conflicting evidence as to the use being permissive will not be disturbed upon appeal.

1D.—TESTIMONY OF HOSTILE WITNESS—DECLARATIONS FAVORABLE TO OPPOSITE SIDE.—Where a hostile witness uses expressions favorable to the side he opposes, the court may properly attach more importance thereto than to the main purport of his narrative.

APPEAL from an order of the Superior Court of Solano County denying a new trial. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

Sullivan & Sullivan, Theo. J. Roche, and H. D. Gill, for Appellants.

Frank R. Devlin, for Respondent.

SHAW, J.—The sole question presented in this case is the sufficiency of the evidence to sustain the finding that the plaintiff's predecessors in interest acquired by prescription the private right of way involved.

The case comes within the well-known rule that this court is bound by a decision of the lower court upon conflicting evidence. There was evidence to the effect that the road, or way, across the defendants' land had been used in connection with, and for the benefit of, plaintiff's land continuously and without interruption from the year 1871 down to 1902, immediately before the action was begun. There was no dispute over the fact that the use was continuous during this period. It was also shown that, during at least the last twenty-seven years of the time, gates were maintained and kept in repair by the owners of plaintiff's land at each end of the way, one of them being placed in the fence belonging to the defendants. The testimony on behalf of the plaintiff was to the effect that the use during the entire period was undisturbed. That it was adverse in its inception is not denied. Casey, who was the owner of the plaintiff's land from 1875 until June, 1902, testifying for the defendants, said, in substance, that during the first three years of his ownership he used the way under a claim of right. If the testimony on behalf of the defendants is disregarded, or only those parts are accepted which tend

to confirm the plaintiff's case, as some parts of it do, the fact is clearly established that there was an open, visible, continuous, and unmolested use of the way for more than thirty years prior to the beginning of the action. Under these circumstances it will be presumed that the use was under a claim of right and adverse, and a *prima facie* title by prescription is thereby established. (Washburn on Easements, 4th ed., p. 156; 14 Cyc. of L. & P. 1147; *Kripp v. Curtis*, 71 Cal. 66, [11 Pac. 879]; *Franz v. Mendonca*, 131 Cal. 209, [63 Pac. 361].) "A presumption that the use was under a claim of right and adverse arises from an undisputed use of an easement for the established period of prescription; and the burden is upon the party alleging that the use has been by virtue of a license or permission, to prove that fact by affirmative evidence. . . . Where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, if the other party relies on the fact that these acts or any part of them were permissive, it is incumbent on such party, by sufficient proof, to rebut such presumption of a non-appearing grant; otherwise the presumption stands as sufficient proof, and establishes the right." (Jones on Easements, sec. 186.)

It is claimed that the testimony of the defendants, and of Casey in their behalf, satisfactorily explains this use and conclusively shows that it was by permission, and therefore not adverse. But this testimony as to permission, though not directly contradicted, was in its most important part inherently improbable, or at least it might reasonably have been so considered by the court below. It was, to some extent, equivocal in the use of terms, the defendants themselves were interested witnesses, and their testimony was contradictory to each other and of that of Casey in important details. Casey's testimony was, to some extent, impeached by proof of inconsistent statements and conduct, and he appears to have been somewhat interested in favor of the defendants. Some parts of his testimony slightly corroborated the plaintiff's case, as also do parts of the testimony of the defendants. Where a hostile witness uses expressions favorable to the side he opposes, a court may properly attach more importance thereto than to the main purport of his narrative. The combined effect of all these circumstances may have so impaired the credit of these

witnesses in the mind of the court below that it may have disbelieved them entirely, or regarded only those parts of their testimony which were favorable to the plaintiff. Upon this ground it may have considered their attempted explanation of the character of the use of the way as unreliable, unsatisfactory, and insufficient to prove permissive use. In view of the findings we are bound to presume that it did so consider it. Its conclusions as to the credibility of the testimony in this respect cannot, under the circumstances stated, be overturned or changed by the supreme court. (*Anglo-Californian Bank v. Cerf*, 147 Cal. 396, [81 Pac. 1081].)

The order denying the defendants' motion for a new trial is affirmed.

Angellotti, J., and Sloss, J., concurred.

[S. F. No. 4591. In Bank.—October 11, 1906.]

TERESA BELL, Petitioner, v. SUPERIOR COURT OF
THE CITY AND COUNTY OF SAN FRANCISCO et
al., Respondents.

COSTS ALLOWED UPON APPEAL—CONSTRUCTION OF CODE—COST-BILL—SERVICE—CONSTITUTIONAL LAW.—Section 1034 of the Code of Civil Procedure, in regard to the collection of costs awarded upon appeal, if taken strictly alone, would be unconstitutional, as allowing property to be taken without notice or an opportunity to be heard; that section must be construed with section 1033 of the Code of Civil Procedure as analogous, so as to require service of the memorandum of costs upon the opposite party and an opportunity for retaxation before execution can be properly issued thereupon, and if not so served, the memorandum of costs was properly stricken out, and execution thereupon was properly vacated and annulled.

PETITION for Writ of Review to annul orders of the Superior Court of the City and County of San Francisco striking out a memorandum of costs and quashing execution thereon.
J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

T. Z. Blakeman, for Petitioner.

Edmund Tausky, and Wallace A. Wise, for Respondents.

LORIGAN, J.—This is a petition for a writ of review.

On November 19, 1904, in the case of Teresa Bell v. Mary E. Pleasant et al., on appeal to this court, the judgment and order of the superior court denying the motion of plaintiff for a new trial was reversed (*Bell v. Pleasant*, 145 Cal. 410, [104 Am. St. Rep. 61, 78 Pac. 957]), and the cause remanded to the superior court for a new trial, with costs allowed said plaintiff on appeal.

On the day plaintiff filed the *remittitur* from this court in the superior court she also filed in said court a memorandum duly verified of her costs on said appeal, amounting to the sum of \$269.50, and subsequently had an execution issued thereon as upon a judgment, as provided by section 1034 of the Code of Civil Procedure.

Upon the issuance of said execution, the defendants served and filed a notice of motion in said action for an order of the superior court striking from the files thereof the memorandum of costs of plaintiff, and to vacate and annul the said execution. Said motion was based upon the ground that neither said memorandum of costs allowed on appeal nor notice of the filing thereof had ever been served upon defendants, and supported the motion by an affidavit showing the fact of such non-service, which was not controverted. Upon the hearing the superior court made an order granting said motion, and struck out said memorandum of costs, and vacated and annulled said execution.

Thereupon this proceeding was commenced by plaintiff to have these orders of the superior court, striking out said memorandum of costs and quashing said execution, set aside and annulled as in excess of its jurisdiction.

Proceeding now to a consideration of the matter on its merits.

In the chapter in the Code of Civil Procedure on "Costs" it is provided by section 1033 thereof, stating its provisions generally, that a party in whose favor judgment is rendered,

and who claims costs, must file and serve a verified memorandum thereof upon the adverse party within a given time, and that if the party so served is dissatisfied with the costs claimed, he may, within a certain time, move to retax them.

Section 1034, immediately following, provides that "Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the *remittitur* is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed by the preceding section, and thereafter he may have an execution therefor as upon a judgment."

It will be observed that this latter section does not in terms provide for service of any notice on the adverse party relative to such memorandum, and it is insisted by petitioner that, as he complied literally with the provision of that section by filing his cost-bill within thirty days after the filing of the *remittitur*, that is all that the law required of him, and he was entitled to execution; that not only is no notice required to be given by that section, but that the section itself contains no specific provision for retaxing costs, and that if illegal or excessive items of costs are charged, application must be made to this court for relief, or an independent action in equity be brought for that purpose.

But this court has nothing to do with the particular items of costs to which a party may be entitled under a judgment rendered therefor by this court. The effect of our judgment is simply that a party is entitled to costs. What they are, the specific amount which he would be entitled to have fixed or allowed therefor, are matters to be determined by the trial court to which the cause is remanded, or to which the *remittitur* runs. The determination of that court on the subject necessarily constitutes the definite and specific judgment concerning which the general right to recover was declared by this court. There is no provision of law authorizing this court to tax or retax the costs it allows on appeal from a judgment or order of the superior court, either reversed or affirmed. That is a matter solely for consideration in the lower court.

And it is true that section 1034 does not provide for any right of the party against whom costs are claimed to have them retaxed. The section, as literally construed, provides

neither for a notice of the filing of the cost-bill, nor for any right to the adverse party to be heard concerning the legality or propriety of any of the items in it.

And herein rests the vice of the section, if it is to be construed as contended for by plaintiff, that there is no provision in the law requiring notice of the filing of the memorandum, or affording defendants a right to be heard concerning its items, because under such circumstances costs are imposed and the judgment for them obtained without affording any right or opportunity to defendants to be heard in the matter. Any and all kinds of illegal and excessive charges may be made. No authority is conferred on the court by the section to revise them; the memorandum is simply filed with the clerk, and execution therefor may immediately be issued and the property of defendants taken upon such execution under judgment for costs obtained against them without notice. It hardly needs to be suggested that if the section in question is to be so construed, that it is violative of the constitutional provision (Const., art. I, sec. 13) that no person shall be deprived of his property without due process of law, which is held to mean upon notice and an opportunity to be heard in the matter in which the judgment follows. (*Hovey v. Elliott*, 167 U. S. 409, [17 Sup. Ct. 841].) There is nothing in the point that the defendants may have their action in equity. Certainly it has no force here. If the order or judgment for a specific amount of costs under the section referred to is void for want of notice and an opportunity to be heard, the method adopted here is a proper proceeding for annulling it, and it is immaterial what other redress, if any, defendants might have.

It is suggested, too, that the section itself was notice to the defendants that within thirty days after the filing of the *remittitur* the plaintiff might file a memorandum of costs, and that it was the duty of defendants to look out for such filing, and, if they questioned the items of the memorandum, to file a motion to retax costs.

But if we assume that the section is itself notice, still the constitutional objection is not obviated, because there is nothing contained in section 1034 conferring any right upon the adverse party to question the tax-bill, by either a motion to retax or in any other manner. He is given no right whatever

to be heard, assuming that the section gives notice. He is given only a partial measure of his constitutional rights,—notice,—but the right to be heard before a judgment which may deprive him of his property on execution thereunder is made is not given him at all. Hence the claim of petitioner as to the section giving notice does not obviate the constitutional difficulty which the failure to confer any right upon the adverse party to be heard presents.

In view of our discussion so far, relative to section 1034 alone, this situation presents itself, that while this court is authorized under the law to award costs upon appeal, and the lower court to which our mandate runs is the tribunal where they are to be specifically ascertained, yet the judgment of this court as to such award is rendered ineffectual because no provision is made in the section in question under which such costs are to be ascertained, for notice to the party sought to be charged with their payment, or an opportunity afforded him to be heard in the lower court relative to them; in effect, that if the right of the prevailing party to have his costs on appeal fixed and an execution issued therefor depends solely upon the provisions of section 1034, then no such right exists, as the section is unconstitutional on account of its failure to provide for notice and an opportunity for the adverse party to be heard.

It is with extreme reluctance that courts feel constrained to hold any law unconstitutional, and only do so when no other alternative presents itself whereby it can be avoided.

In the present case, however, we think that it can be avoided by treating sections 1033 and 1034—sections found in the general chapter on “costs”—as analogous, as was done by the supreme court of Montana, where kindred provisions of the statute of that state were before it for consideration.

In the state of Montana, the Code of Civil Procedure there, in the general chapter concerning costs, contains provisions identical with the sections of our code above referred to, and the same question presented here was presented to the supreme court of that state in a proceeding similar to this. Section 1867 of the Montana code corresponds with section 1033 of ours, and the Montana code section 1869 with section 1034 of this state. The same point was raised in the supreme court of Montana as raised here,—namely, that section 1869 of the

Montana code (sec. 1034 of ours) in failing to provide for notice to the adverse party of the filing of the memorandum of costs and providing an opportunity for him to be heard relative thereto, was unconstitutional as depriving one of his property without due process of law. In discussing the point the court there said: "We do not think it necessary to hold section 1869 unconstitutional. The chapter of which this section is a part has to do with costs and the mode by which they may be collected. Section 1867 points out the mode to be pursued for the collection of costs in the district courts, and also in original proceedings in this court; at least it does not in terms apply to district courts exclusively. Section 1869 points out the mode by which they may be collected when awarded on appeal; but we think that all the analogies, as was stated in *State ex rel. Hurley v. District Court*, 27 Mont. 40, [69 Pac. 244], require notice of the claim to be given under the provisions of section 1867, or that they should be denied. While the exact point now before the court was not raised in *State ex rel. Hurley v. District Court*, *supra*, yet what was there said as to the necessity of notice was not impertinent and is wholly applicable in this case. This rule must govern or the conclusion is inevitable that section 1869 is invalid, and that parties have no means provided by which they may collect costs awarded to them by this court on appeal. Section 1867 clearly does apply to proceedings in this court in some respects. We think it must be held to apply also to the method of claiming in the district court costs awarded by this court on appeal, and that the method pointed out must be pursued, else the court has no power to settle controversies in any manner concerning them. . . . Costs, as costs, are allowed only by statute and can be collected only by the method pointed out by the statute. [Citing authorities.] When, therefore, the party claiming costs has failed to claim them as directed by the statute, his right to them has not attached, and the court has no other power in the premises than to strike out and disallow them on motion of the adverse party. For these reasons we think that the district court, in proceeding to tax and allow any portion of the bill in controversy, was wholly without jurisdiction, and the order must be annulled." (*State v. District Court* (Mont.), 85 Pac. 367.)

The effect of the ruling of the Montana supreme court was,

that while the section of the Montana code (sec. 1869), like our section 1034, did not provide, in terms for notice to the adverse party of the filing of a cost-bill in the lower court for costs awarded by the appellate court, still by analogy the provisions of section 1867—our corresponding section 1033—providing for the presentation and settlement of cost-bills where judgments were obtained in the trial court controlled, and that the same notice required there to be given should be given when it is sought to have costs, awarded generally in the appellate court, specifically taxed in the lower court after the appellate judgment allowing them.

We are satisfied with the reasoning in the Montana case, and with the conclusion reached in support of the constitutionality of the section in question, when considered in connection with the other section relative to the matter of taxing costs in the trial court to which we have referred. It is a reasonable and warranted construction which aids in securing to one the benefit of a judgment for costs given to him by the appellate court and of which he would be deprived, at least as far as section 1034 is concerned, were a different result arrived at.

As both sides have presented this matter on the merits, we have so disposed of it regardless of any question as to whether this application for a writ is the proper remedy.

The petition for the writ is dismissed.

Henshaw, J., Sloss, J., McFarland, J., and Angellotti, J., concurred.

SHAW, J., dissenting.—I dissent. I do not think it necessary to declare section 1034 unconstitutional. Section 1033, in my opinion, was not intended to apply to the costs on appeal, and section 1034 is valid without aid from the preceding section. The fact that no notice is expressly required in section 1034 should not render the provision invalid. Nor should it be held that the provision that an execution for such costs may be issued without notice, invalidates the entire section unless the clause of section 1033 in regard to notice is read also into section 1034. It does not follow, from the lack of an express provision in the code for a previous or contemporaneous notice, that the entire proceeding would be unconstitutional. The court has inherent power to afford an ample remedy for any injustice

that may be attempted by the filing of an excessive cost-bill. The entire argument of the prevailing opinion is based on a false premise which is not stated,—namely, that the superior court cannot entertain any motion, nor afford any relief in a case by any procedure, unless the motion or mode of relief is prescribed in the code or by some statute. This I hold to be a mistake. The superior court is a court of general jurisdiction, possessing all the usual and ordinary powers of the former courts of law and equity, and it may therefore, in any emergency not provided in the code, follow the practice of the common law and chancery courts in similar emergencies, and may adopt any procedure suitable to the exigencies of the case over which it has jurisdiction. (Code Civ. Proc., sec. 187.) The statute allows the prevailing party on appeal to file his cost-bill without notice. This, of necessity, cannot conclude the adverse party. An unsettled question, the correct amount of costs, remains for determination in such a case, and the court retains jurisdiction for that purpose. The losing party may at any reasonable time thereafter, either before or after the issuance of an execution, avail himself of this jurisdiction and move the court to retax the cost by striking out the items not allowable and reducing those which are excessive. And no doubt proceedings on execution could be stayed pending the determination of such motion, and the execution could be corrected after the motion was decided. The only restriction upon the right to this motion is that the party must not, after he has notice of the bill, unreasonably delay moving to retax, else he may be defeated by his laches. All these matters, in the absence of statutory provisions on the subject, are within the inherent power of the court. No statute is required to give the court the necessary power to protect the rights of parties to the litigation. In many of the states the costs are taxed by the clerk, without notice to either party, and no statutory procedure for retaxing is provided, and yet motions by either party to retax such costs are among the most frequent of proceedings in those courts, and the power to decide them has never been doubted. The time within which they must be made is a matter for adjustment in such states by judicial decision. The same power must exist in this

state in cases for which the code makes no provision. The courts are as capable as the legislature of framing a rule and procedure that will be reasonable and just to all parties, and no evils are to be apprehended from the exercise by the courts of the power in this respect which the legislature has committed to them by section 187 aforesaid. In my opinion, the court below should not have granted the motion to strike out the costs, except upon a showing that they were not legally allowable. The appellant has followed the plain letter of the statute and the effect of the majority decision will be that she will be now entirely deprived of her costs, and this is done by means of a strained and unnatural construction adopted to avoid a difficulty which does not exist.

[L. A. No. 1459. In Bank.—October 11, 1906.]

JOHN L. PAVKOVICH, Appellant, v. SOUTHERN PACIFIC RAILROAD COMPANY et al., Respondents.

DEED OF QUARRY—LIMITATION OF PURPOSE—CONSTRUCTION—RESERVATION—CONDITION—INJUNCTION.—A deed of land for the use of a railroad way to stone quarries, and of the quarry tract, "for the purpose and with the limitation that the rock and material taken therefrom by the party of the second part, or by its lessees or assigns, is for railroad purposes," and that they are "not to carry on the business for any other purpose," with a subsequent condition that the estate is to be forfeited if the railroad is not constructed to the quarries within two years, is not to be considered as inconsistent in its provisions; but the "limitation," whether considered as a covenant running with the land or not, is not in restraint of trade, but is to be taken as qualifying the estate granted, for the benefit of the grantors, and as in effect a reservation to be liberally construed in favor of the grantors, and their successors, and as forbidding the taking of stone for any other purpose; and equity will, at the suit of the successors of the grantors, enjoin the taking thereof for the use of a breakwater by the assigns of the grantee.

ID.—CONTINGENT INTEREST IN LAND—PROTECTION AGAINST WASTE BY INJUNCTION—DAMAGES.—The owner of a contingent future estate in land is entitled in equity to enjoin a threatened destruction of the substance of that estate by the tenant in possession, whether

such threatened destruction be total or partial; and when land is conveyed subject to a condition a breach of which will work a forfeiture of the estate granted, the grantor retains an interest in the land the value of which may be impaired by waste; and if the deed expressly limits the purposes for which stone may be taken from a quarry, and which imposes a practical limit to the quantity to be taken, the owner of the contingent estate, though not entitled to recover damages for rock actually removed, is entitled to enjoin further waste in the taking of rock in excess of such limit.

ID.—STIPULATION IN FAVOR OF AND AGAINST GRANTEE.—Where the assigns of the grantee were expressly named in the deed, whatever right the grantors had to protect their interest in the land passed to their grantee and inured in his favor against the assigns of the original grantee. The estate of the grantors was alienable; and their right to sell the estate includes the right to transfer the means of protecting it.

APPEAL from a judgment of the Superior Court of San Bernardino County. Frank F. Oster, Judge.

The facts are stated in the opinion of the court.

Charles L. Allison, Davis & Rush, and A. W. Hutton, for Appellant.

Bicknell, Gibson & Trask, and Edward E. Bacon, for Respondents.

BEATTY, C. J.—Upon a careful reconsideration of this case after rehearing ordered, we find no occasion to modify our original opinion. Nor do we deem it necessary to undertake a discussion of the proper construction of our code provisions relating to covenants running with the land. Our conclusions are not rested upon those provisions, and they contain nothing inconsistent with what we have decided. Conceding that there is here no covenant running with the land in a strict legal sense, we still hold that the plaintiff, as the owner of a contingent future estate in the land, is entitled in equity to enjoin a threatened destruction of that estate by the tenant in possession, whether such threatened destruction be total or partial. When land is conveyed subject to a condition, breach of which will work a forfeiture of the estate granted, the grantor retains an interest in the land, the value of which will be impaired

by the pulling down of houses, the cutting of timber, or the quarrying and removal of stone or any other valuable material contained in the soil, and it would be strange if the law afforded him no means of protecting his interest. It may be that there is a presumption in such case that there will be no breach of the condition subsequent, and that there is a probability that the estate will never be forfeited, but in dealing with the rights of the grantor a court is bound to assume, as the parties by their deed have assumed, that there may be a breach of the condition, and to hold that the grantee has no right in the mean time to make way with the very substance of the estate. If in such case the deed contained no express provision restraining the removal of the soil, or cutting of timber, or other destructive use of the land, we are clearly of the opinion that a court of equity would enjoin a threatened injury of the magnitude alleged in this case. But here the deed expressly limits the purposes for which the stone may be taken, and this imposes a practical limit to the quantity that will be taken, and the right of the grantor, or his successor, to enjoin the transgression of that limit is even clearer than the right to an injunction would have been in the absence of such express provision. Of course, there are exceptional cases to which the doctrine here asserted does not apply. One of them is defined in section 819 of the Civil Code—the lease of a going mine or quarry. But such exceptions only fortify the general doctrine.

As to the objection so strongly urged that the stipulation in question is not binding upon the successors of the Pacific Improvement Company, and does not inure to the successor of the grantors, our opinion remains unchanged, and ought not to be misunderstood. The assigns of the grantee are expressly named in the deed, and whatever right the grantors had to protect their interest in the land passed by their conveyance of the land to their grantee. Their estate was alienable, and the right to sell an estate includes the right to transfer the means of protecting it.

Our decision rests, of course, upon the case as presented in the record before us. If there are other facts or circumstances proof of which would have a legitimate bearing upon the true construction of the deed to the Pacific Improvement

Company, nothing we have said will prevent the defendant from alleging and proving such facts.

The judgment of the superior court is reversed.

SLOSS, J.—I concur in the judgment. What the plaintiff's rights would have been if the deed had contained no provision limiting the grantee's right to take rock is a question not involved in this case, and I express no opinion upon it. It is enough to say that the deed under which the defendants hold did restrict the right of the grantee and its successors in interest to do certain acts destructive of the substance of the estate, and that this estate might, on breach of a condition subsequent, revert to the grantor. Such restrictions may lawfully be annexed to the conveyance of an interest less than an unqualified fee, and will be enforced at the suit of the holder of the future estate. (*Blake v. Peters*, 1 DeG. J. & S. 345.)

Henshaw, J., Angellotti, J., Shaw, J., and Lorigan, J., concurred.

McFARLAND, J.—I dissent, and think that the judgment should be affirmed.

The following is the original opinion rendered upon the former hearing in Bank, May 24, 1906:—

SHAW, J.—Since the taking of this appeal the plaintiff has died, and Spiro B. Radovich, as the executor of his last will, has been substituted as plaintiff in his stead. The appeal is by plaintiff from a judgment in favor of the defendants, upon the sustaining of a demurrer to the complaint based on the ground that the complaint does not state a cause of action. The action purports to be for damages caused by the removal of rock from certain land, and to enjoin further waste of the same character. On April 25, 1888, Declez and Beaudry were the owners in fee simple of the land in question, the same being a part of section 35, township 1 south, range 6 west, San Bernardino base and meridian. They also apparently owned the entire section, or a considerable part thereof. On or near to this section were certain stone quarries known as the "Declez Quarries," but whether or not Declez and Beaudry had any

interest therein does not appear. On the day mentioned they executed to the Pacific Improvement Company a deed, conveying to said company certain strips of land in said section, to be used as ways for a railroad connecting said quarries with the main line of the Southern Pacific Railroad from Los Angeles to Yuma, and certain spur tracks necessary for the convenient working of the quarry, and also the tract from which the defendants are now taking rock, which tract contains seven acres of land. The conveyance of this seven-acre tract of land was expressly made subject to certain limitations, upon the effect of which the plaintiff's right of action depends. After the execution of this deed the Pacific Improvement Company conveyed all its right, title, and interest thereunder to the defendant, the Southern Pacific Railroad Company, and the plaintiff became, and still is, the owner in fee simple (but subject to the rights of the defendant under the deed of Declez and Beaudry to the Pacific Improvement Company) of all the lands described in said deed, including the seven-acre tract. The California Construction Company is building for the United States the breakwater in the harbor at San Pedro, and for that purpose, by agreement with the Southern Pacific Railroad Company, is quarrying and removing rock from the seven-acre tract, and using the same in the construction of the breakwater. The plaintiff in this action seeks to recover damages for the rock that has been taken from this tract for that purpose, and to enjoin the further taking thereof for such purpose.

The right of the defendants to take this rock, and of the plaintiff to maintain this action, depends on the effect of certain clauses of the deed of Declez and Beaudry to the Pacific Improvement Company. This deed first conveys the strips of land intended for the rights of way. Then follow the paragraphs purporting to convey the seven-acre tract and the qualifying clauses. This part of the deed is as follows:—

“And the said parties of the first part also grant and convey unto the said party of the second part a tract of land in said section 35, described as follows: [Here is described the seven-acre tract in controversy.]

“The conveyance of the tract of land last-above described to

the party of the second part is for the purpose and with the limitation that the rock and material taken therefrom by the party of the second part or by its lessees or assigns is for railroad purposes, and the party of the second part or its lessees or assigns is not to carry on the business of furnishing rock for any other purpose than that of railroad purposes, or for such purposes and in such business as the party of the second part may be engaged.

"This conveyance is made to the party of the second part on condition that the said party of the second part shall construct a railroad from the main line hereinbefore described within two years from the date hereof, and shall operate the same; and in the event that said railroad is not constructed within the time above mentioned, or if the said party of the second part shall fail to operate said railroad or abandon the same as a railroad, then and thereupon the estate hereby granted shall be forfeited to the parties of the first part, their heirs or assigns, and this conveyance shall become null and void.

"This conveyance is made for the purpose and to the end that a railroad shall be constructed and operated over the line aforesaid from the main track of the Southern Pacific Railroad to the quarries herein mentioned, and that the same be completed and operated within two years from this date."

The plaintiff claims that the effect of the qualifying clauses quoted is to limit or qualify the estate which would otherwise pass by the words "grant and convey," so that the estate actually transferred is not a fee simple, but a fee qualified by the limitation that the grantee, or its lessees or assigns, shall have no right to remove from the seven acres any rock, except such as should be found necessary or convenient for the building or maintenance of railroads, or for use in some other business in which the grantee might engage; that the provision for a forfeiture upon the violation of the condition subsequent, in effect, reserved to the grantor a contingent estate in the land granted, which could be, and has been, transferred to the plaintiff, and that the ownership of this estate in the land invests the plaintiff with a right to enjoin the taking of rock therefrom for any other purposes than those specified in the limitation. The defendants contend that the limitation

clause does not purport to withhold from the grantee the right to take rock from the land in such quantity as it should choose, even extending to all the rock therein contained, but that it merely limits and restricts the uses to which such rock may be devoted after it is removed; that it is a purely personal covenant, binding only upon the Pacific Improvement Company, and not upon its assigns; that it does not run with the land, and that, in effect, it is a provision that the grantee shall not use rock taken from the land, except for certain purposes, and is a restriction repugnant to the estate conveyed by the granting clause, and therefore void; and hence that the Southern Pacific Railroad Company cannot be enjoined from the removal of any or all of the rock, and, being a grantee of the Pacific Improvement Company, it is not liable in damages in an action on the covenant, which binds no one but the original parties.

A reservation or exception in a grant is to be interpreted in favor of the grantor. (Civ. Code, sec. 1069; Code Civ. Proc., sec. 1864; *Martin v. Lloyd*, 94 Cal. 203, [29 Pac. 491]; *Sears v. Ackerman*, 138 Cal. 586, [72 Pac. 171].) The rules of interpretation in such cases are well stated in *Barnett v. Barnett*, 104 Cal. 300, [37 Pac. 1050], as follows: "A grant is to be interpreted in the same manner as any other contract (Civ. Code, sec. 1066), so as to give effect to the intention of the parties, if it can be ascertained (sec. 1636), and, for the purpose of ascertaining that intention, 'the whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other' (sec. 1641). . . . The rule that, if the *habendum* is repugnant to the premises, it is to be disregarded, is only another form of the rule that, 'if several parts of a grant are absolutely irreconcilable, the former part prevails' (Civ. Code, sec. 1070). The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein, but for the purpose of ascertaining this intention the entire instrument, the *habendum* as well as the premises, are to be considered, and, if it appear from such consideration that the grantee intended by the *habendum* clause to restrict or limit or enlarge the estate named in the granting clause, the *habendum* clause

will prevail over the granting clause. It is in such case to be considered as an *addendum* or proviso to the conveyancing clause, which, by a well-settled rule of construction, must control the conveyancing clause or premises, even to the extent of destroying the effect of the same." In other cases it is said that "The tendency of modern decisions is to uphold conveyances, and give effect to the intention of the parties, regardless of technical rules of construction." (*Faire v. Dailey*, 93 Cal. 671, [29 Pac. 258].) "It matters little what name we give to the rights reserved to the grantor in a deed. Attempts to create symmetry in the law by classification and designation of classes of different kinds of rights connected with, and springing out of, lands are always hazardous" (*Painter v. Pasadena etc. Co.*, 91 Cal. 84, 85, [27 Pac. 542]); and "to arrive at this intention, the situation of the parties and the subject-matter at the time of contracting should be considered." (*Stockton v. Weber*, 98 Cal. 439, [33 Pac. 334]; *Brannan v. Mesick*, 10 Cal. 106.) The clause immediately following the description of the seven acres, which we designate as the limitation clause, is loosely and awkwardly drawn, and discloses the work of one not skilled in the use of language nor familiar with technical definitions. Upon a consideration of the whole instrument and the circumstances appearing therefrom, the intention of the parties is not difficult to ascertain. The main object of the grantors, which is expressed in the last clause, was to secure railroad transportation to the Declez quarries, and the other clauses manifest a clear purpose to give nothing not necessary to attain that object. They were careful to insert a provision forfeiting the granted estate upon the failure to build the road within two years, or to operate it thereafter, so that, upon failure to secure the object, the grantors would lose nothing and the grantee would obtain nothing. The seven acres were manifestly demanded by the grantee in order to get rock therefrom for use in its business of railroad construction. The purpose of the limitation clause, though awkwardly expressed, was to define and restrict this right as the parties understood it to be given. It qualifies the grant for the benefit of the grantors, and consequently is, in effect, a reservation to be interpreted in their favor. The design was, in part at least, to protect the contingent estate so that, if it became vested, the grantors would not find it

stripped of the rock not required for the uses allowed. To construe it as providing that all the rock could be removed by the grantee, but that, when removed, no use could ever be made of any of it, except the limited use mentioned, so that the remainder could be taken for no purpose at all, except to violate the agreement, or wantonly to injure the grantors, would render the clause, to that extent, foolish, ridiculous, and vicious. A construction producing such results is to be avoided if any other reasonable meaning is possible. In view of the objects to be accomplished, the provision that "the conveyance is for the purpose and with the limitation that the rock taken from the land by the grantor is for railroad purposes," may reasonably be understood to have been intended to prohibit the taking of rock for any other purpose. The doctrine that where the *habendum*, or other subsequent clause, is repugnant to the premises, the premises must prevail, applies only where the two are irreconcilable. And it does not apply where it appears from the whole conveyance, or from the language of the subsequent clause, that the grantor intended thereby to qualify the granting clause, or where the grantee will receive an estate of value even if the granting clause be modified as may be necessary to give effect to all parts of the deed. (*Barnett v. Barnett*, 104 Cal. 300, [37 Pac. 1050]; *Faivre v. Dailey*, 93 Cal. 671, [29 Pac. 258]; *Morrison v. Wilson*, 30 Cal. 344; *Pellissier v. Corker*, 103 Cal. 518, [37 Pac. 465]; 1 Devlin on Deeds, sec. 215a; *Bodine v. Arthur*, 91 Ky. 53, [14 S. W. 904, 34 Am. St. Rep. 162]; *Fogarty v. Stack*, 86 Tenn. 610, [8 S. W. 846]; *Bassett v. Budlong*, 77 Mich. 338, [43 N. W. 984, 18 Am. St. Rep. 404]; *Gay v. Walker*, 36 Me. 54, [58 Am. Dec. 734]; *Cooney v. Hayes*, 40 Vt. 478, [94 Am. Dec. 425]; *Cravens v. White*, 73 Tex. 577, [11 S. W. 543, 15 Am. St. Rep. 803].) The clause is therefore, in effect, a limitation upon the estate of the grantee in the seven-acre tract to the extent that it could not take rock therefrom except for the purpose therein stated. Hence it follows that the grantee had no right, as against the grantors, to take the rock for the purpose of constructing a breakwater.

In support of the position that the limitation clause is a mere personal covenant, binding on the Pacific Improvement Company alone, the defendants rely on the decision in *Lee*

Angeles Terminal Land Co. v. Muir, 136 Cal. 36, [68 Pac. 308]. The clause considered in that case followed a clause purporting to grant an estate in fee simple, and it was expressed in these words: "It is hereby covenanted and agreed by and between the parties hereto, that, in consideration of this conveyance, no saloon business or business of vending malt, vinous, or spirituous liquors, shall ever be carried on upon said lot, neither shall said lot be used for any business or store purpose other than for hotel, lodging-house or club purposes." It did not purport to be made by, or on behalf of, or for the benefit of, the assigns or lessees of either party, but ran to the parties only, and the deed contained no reservation to the grantor of any interest, conditional or otherwise, in the land granted. Herein it was essentially different from the instrument here in question. In that case the original grantee was not a party to the action, and the court, upon the point that the covenant was personal and binding on the grantee only, and hence not enforceable in equity against a subsequent grantee, say that the plaintiff in that case, who was the grantor, "could have inserted a covenant which would have inured to the protection of plaintiff's grantee or successor in interest, and would have expressly bound the yacht club [the grantee in the deed]. It did not do either, but contented itself with a covenant, in its terms purely personal, purporting to create a restriction upon the use of the property so long only as the vendee should retain the title, . . . and as there is no personal contract relation between the parties to this action, the plaintiff is not entitled to any relief against the defendants, unless the evidence shows with reasonable certainty that the use of the lot for ferry purposes would materially injure the remaining property of the plaintiff." In the present case the clause in question, treating it as a covenant not to take rock except for certain uses, expressly purports to bind the grantee, and also its lessees and assigns. There is also a condition subsequent whereby there is reserved to the grantor a contingent estate in the identical rock which the defendants are removing. This contingent estate is a species of property and may be transferred. (Civ. Code, sec. 699.) It has been transferred to the plaintiff, who, it is alleged, is now the owner thereof. There is therefore an existing contract relation and

privity of estate between the parties to the action. The removal of this rock, of necessity, will materially injure the value of the contingent estate in the land, and, being removed for a forbidden use, it constitutes sufficient ground for the interposition of equity. It is our opinion that the restrictive clause may be considered as a limitation in favor of the grantors upon the use of the estate granted, and against the grantee, its lessees, and assigns, made for the purpose of feeding and protecting the grantors' contingent estate reserved by the next succeeding clause of the deed, and that it is also a personal covenant binding on the successors in interest of the grantee, by which they are prohibited from removing the rock for the use they are making of it; and hence that they may be restrained from so doing. We do not consider the question whether or not the covenant was one which runs with the land to be material to the decision of the case.

The objection that the complaint does not show that the plaintiff is an heir or assign of the original grantors is not well taken. It alleges that the plaintiff is, and has been ever since November 10, 1900, the owner in fee simple of all the lands described in the deed in question, "subject only to the terms and provisions" of the said deed. This means that he is the owner of all the estate and rights reserved therein to the grantors. He could only become such owner by descent or purchase from the grantors or their successors in interest; and hence he is either an heir or assign. Respondents also contend that if the qualifying clauses of the deed are to be considered effectual to forbid the sale or other disposition of the rock taken from the seven acres, they constitute a contract in restraint of trade, and are void for that reason. This claim is based on the theory, which we hold untenable, that the deed does not forbid the quarrying or removal of rock, but only forbids certain uses of it after such removal. Where a grantor reserves a contingent estate in the land granted, and a condition or covenant is inserted in the deed forbidding the grantee from removing for certain uses a part of such realty, the removal of which would lessen the value of such contingent estate, such condition or covenant is a lawful contract for the protection of the grantor's interest, and cannot be deemed a contract in restraint of trade. By the terms of the cov-

enant the parties are not to be restrained from engaging in the business of quarrying or selling rock in general, but only from taking for that purpose certain rock in which the plaintiff has an interest.

It is further contended that an action to recover damages for waste, or to restrain waste, cannot be maintained by one having only a contingent estate, to become vested only upon a forfeiture for a violation of a condition subsequent. So far as the claim for damages for waste already committed, based upon the ownership by the plaintiff of such contingent estate, is concerned, this contention must be sustained. The plaintiff's interest is not vested (Civ. Code, secs. 693, 695); and hence he has no present property in the rock removed, for the value of which damages can be computed, or to which he could have the right of present possession. (*Hunt v. Hall*, 37 Me. 363; *Peterson v. Clark*, 15 Johns. 205; *Sager v. Gallo-way*, 113 Pa. St. 500, [6 Atl. 209]; *Brashear v. Macey*, 3 J. J. Marsh. 93; *Cannon v. Barry*, 59 Miss. 289; *Gordon v. Lowther*, 75 N. C. 193.) But the rule is different with regard to the equitable remedy by injunction. The owner of a contingent interest may protect that interest against deterioration or destruction by enjoining a threatened waste. This is well settled by the authorities. (*Hayward v. Stillingfleet*, 1 Atk. 422; *Robinson v. Litton*, 3 Atk. 209; *Brashear v. Macey*, 3 J. J. Marsh. 93; *Cannon v. Barry*, 59 Miss. 289; *Miles v. Miles*, 32 N. H. 147, [64 Am. Dec. 362]; *Petersen v. Ferrell*, 127 N. C. 169, [37 S. E. 189]; *Cowand v. Meyers*, 99 N. C. 198, [6 S. E. 82]; *Gordon v. Lowther*, 75 N. C. 193; *Braswell v. Morehead*, 45 N. C. 26, [57 Am. Dec. 586]; *Lewisburg University v. Tucker*, 31 W. Va. 621, [8 S. E. 410].) It comes within the rule that an injunction will be granted to prevent an injury to real property which consists of the removal or destruction of the substance of the estate, or where the party injured cannot be adequately compensated in damages, or where the resulting damages cannot be measured by any certain pecuniary standard. (*Richards v. Dower*, 64 Cal. 63, [28 Pac. 113]; *Silva v. Garcia*, 65 Cal. 592, [4 Pac. 628]; *More v. Massini*, 32 Cal. 595; 16 Am. & Eng. Ency. of Law, 361.)

With respect to the breach of the covenant not to take rock, except for the permitted purposes, the breach of such a con-

tract, of itself, constitutes a cause of action for at least nominal damages. Whether, in view of the nature of the plaintiff's interest, anything more can be recovered, is a question not discussed by counsel, and, as it is not necessary to the decision of the case, we express no opinion in regard to it.

From the conclusions we have reached, it necessarily follows that the demurrer should have been overruled.

The judgment is reversed.

[S. F. No. 3572. In Bank.—October 11, 1906.]

HUNT BROTHERS COMPANY et al., Appellants, v. SAN LORENZO WATER COMPANY, Respondent.

BREACH OF CONTRACT—MEASURE OF DAMAGES—PROBABLE RESULT CONTEMPLATED BY PARTIES.—The only damages recoverable for breach of contract are such as the parties may be reasonably supposed, in the light of all the facts known or which should have been known to them at the time of making the contract, to have considered as the probable result of a breach, or as likely to follow therefrom, in the ordinary course of things, and therefore to have, in effect, stipulated against. Other damages are too remote and cannot be recovered.

ID.—BREACH OF CONTRACT FOR WATER SUPPLY—LOSS OF PREMISES BY FIRE, WHEN RECOVERABLE—DEFINITE CONTRACT.—It is only where a definite contract calls for the continuance of an instituted water service for the purpose of extinguishing fires, or calls for a service to be instituted at a definite time, under circumstances known to the parties, making it essential that particular protection from fire should then commence, that loss of the premises by fire may be recovered as having been reasonably supposed to have been within the contemplation of the parties.

ID.—INDEFINITE CONTRACT—REMOTE DAMAGES.—Under an alleged contract for a general water supply and for a fire-hydrant to be installed, in which no definite time appears to have been fixed for its commencement, and no special circumstances appear making it essential that the agreed service should be commenced at any particular time, or within a reasonable time, and the rate agreed upon was to begin only when the service was installed, damages resulting from the loss of the premises by fire before the installation of such service, are too remote to be considered as within the contemplation of the parties and cannot be recovered.

APPEAL from a judgment of the Superior Court of Alameda County. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

Van Ness & Redman, for Appellants.

E. S. Pillsbury, Alfred Sutro, and Pillsbury, Madison & Sutro, for Respondent.

ANGELLOTTI, J.—This is an appeal from a judgment given in favor of defendant, a demurrer to plaintiffs' amended complaint having been sustained, and plaintiffs having failed to amend.

The action was brought to recover \$124,496.98, damages, resulting from the destruction of certain property, the injury to other property, and a loss of profits from an established business, all occasioned by fire, which occurred on April 12, 1901, which fire occurred without any fault on the part of plaintiffs. The corporation, Hunt Brothers Company, which will hereafter be called the plaintiff, was the owner of all said property. The numerous other plaintiffs were insurance companies which had, at the time of the fire, policies in force covering respectively various portions of said property, insuring plaintiff against loss by fire, and which had paid plaintiff upon said policies on account of said loss, amounts aggregating \$91,221.42, and, having received assignments from plaintiff of its claim against defendant to the extent of the amount so paid by them, are here endeavoring to collect the amount paid by them from defendant.

The plaintiff was engaged in the business of fruit-canning, packing, manufacturing cans, storage of fruits, canned goods, etc. The property injured and destroyed consisted of certain buildings used and occupied in the conduct of said business, machinery and other implements used in such business, and the stock on hand, and seventy-four cottages occupied by employees of plaintiff. All this property was situated on certain premises occupied by plaintiff in Hayward, Alameda County, California. The allegations of the complaint upon which it is sought to hold defendant liable for the amount of this loss are substantially as follows: Defendant was a water

company, engaged in the business of supplying water to the inhabitants of Hayward by means of mains laid in the streets of the town, and pipes running therefrom to the premises of its customers. Some time between September, 1900, and March, 1901, plaintiff and defendant entered into an agreement, whereby defendant agreed to lay a six-inch main from one of its mains charged and supplied with water, to a point near one corner of plaintiff's premises, to connect said premises with this new main by a service-pipe, and to thereupon supply plaintiff by means thereof with one hundred thousand cubic feet of water annually, at the rate of twenty-five cents per one hundred cubic feet, and as much more as might be required at twenty cents per one hundred cubic feet, plaintiff agreeing to consume annually one hundred thousand cubic feet, and pay for it at the twenty-five-cent rate. Defendant further agreed that it would erect and install a fire-hydrant near said premises, to be used by plaintiff in case the premises should take fire, and connect the same with said main, and supply plaintiff by means thereof with water for the purpose of extinguishing any fire which might occur on said premises, in consideration of the payment by defendant to plaintiff of \$2.75 a month, which defendant agreed to pay.

No time was specified for the commencement or completion of this work. Defendant laid the new main to a point near one corner of plaintiff's premises, as agreed, but failed to install the service-pipe or the fire-hydrant. On March 14, 1901, plaintiff remonstrated with defendant because of its failure to do these things, and defendant, on March 15, 1901, promised in writing that it would "immediately commence the work" of putting in the service-pipe to connect the premises with the main, and also that it would "immediately commence the work" of erecting and installing said fire-hydrant and connecting the same with the main. It failed to commence to do either of these things prior to the fire.

It is alleged that if defendant had commenced the work of connecting said premises with the main, and the work of erecting, installing, and connecting the fire-hydrant, as it had agreed to do, and had prosecuted said work to an end with ordinary diligence, said premises would have been so connected and said fire-hydrant installed and connected and ready for use in March, 1901, and that if said hydrant had been so installed

and connected at the time of the fire, said fire could and would have been extinguished by means of the water which would have thereby become available, before it had damaged the property to the extent of five thousand dollars; and that, therefore, the additional loss and damage were wholly due to defendant's neglect and failure to comply with the terms of its agreement.

We are satisfied that the damages alleged cannot be recovered as a consequence of the breach of contract alleged.

In so saying we do not dispute the proposition made by learned counsel for appellant, to the effect that a failure to furnish water under a contract requiring one to do so, may, under some circumstances, entitle the other party to the contract to recover as damages for such breach of contract the value of such of his property destroyed by fire as would have been saved by the water, had it been furnished in accordance with the contract. We have examined the cases cited from other states by counsel upon this proposition, and find that with practical unanimity they appear to support the conclusion that the circumstances may be such as to make the person who agreed to furnish water for the extinguishment of fires, liable for the failure to furnish it as agreed, in the value of such property destroyed by fire as would have been saved by the water, if it had been furnished. (*New Orleans etc. Co. v. Meridian Water Works*, 72 Fed. 227; *Knappman Whiting Co. v. Middlesex Water Co.*, 64 N. J. L. 240, [45 Atl. 692]; *Paducah Lumber Co. v. Paducah etc. Co.*, 89 Ky. 340, [25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249]; *Gorrell v. Water Supply Co.*, 124 N. C. 328, [70 Am. St. Rep. 598, 32 S. E. 720]; *Planters' Oil Mill v. Monroe Water Co.*, 52 La. Ann. 1243, [27 South. 684]; *Lenzen v. City of New Braunfels*, 13 Tex. Civ. App. 335, [35 S. W. 341]; *Atkinson v. Water Co.*, L. R. 6 Ex. 404. See, also, *Ukiah v. Ukiah etc. Co.*, 142 Cal. 173, 179, [100 Am. St. Rep. 107, 75 Pac. 773].)

The cases cited are, however, all cases where the contract had been executed to the extent of installing and commencing the contemplated service, and the respective parties to the contract were acting thereunder, the one purporting to supply water for the purpose designated by the contract, viz.: the extinguishment of fires, and receiving the agreed considera-

tion therefor, and the other paying for such service, and relying upon the continued observance of the contract by the water company as a protection against such fires as might occur on the premises.

As to such a situation it may well be said, as was in fact said in some of the cases cited, that in view of the fact that water may be supplied in such quantity and manner as to usually extinguish a fire before serious damage is done, when promptly and efficiently used, it may reasonably be supposed to have been within the contemplation of the parties that a loss by fire would be the probable result of a failure to comply with the contract at the time the fire occurred. It could only be upon such a theory that one party would pay for the continuance of the service for fire purposes, and the other receive the sums so paid. And it is solely by reason of the fact that in such cases damage by fire may reasonably be supposed to have been within the contemplation of the parties as a consequence of a breach of the contract to furnish water, that the liability for such damage may be held to attach, for it certainly cannot be held that any such liability would exist for the breach of a contract to simply furnish water for no particular designated purpose, or for designated purposes not including the extinguishment of fires, even although it might be that if there had been no breach the fire would have been extinguished in its incipiency by the water furnished, and such breach, therefore, would have been indirectly and remotely the cause of the loss. The law of damages does not concern itself with such remote causes.

As said in *Martin v. Deetz*, 102 Cal. 55, 68, [41 Am. St. Rep. 151, 38 Pac. 368, 372], "Remote results, produced by intermediate sequences of causes, are beyond the reach of any just and practicable rule of damages." Field in his work on Damages (sec. 10) says: "To trace remote effects of causes would often be a difficult, if not an infinite task. It would require an infinite mind. Each cause produces results that in turn, alone or by combination with other causes, produces other effects, and so *ad infinitum*. It is a subject too abstruse and complicated for the human mind. In the quaint language of Lord Bacon, 'It were infinite for the law to consider the cause of causes, and their impulsion one on another.' " No case cited goes to the extent of holding that one

may be liable for a breach of contract to furnish water, in the value of property destroyed by a fire, unless the case was such that damage of this kind might reasonably be supposed to have been within the contemplation of the parties to the contract *as a consequence of a breach thereof*, and in the case of *Beck v. Kittanning Co.* (Pa.) 11 Atl. 300, it was expressly declared that as the plaintiff, who had a contract for water for general use, had no contract with the defendant for a *supply of water for the extinguishment of fire*, he had no cause of action on his contract for damages resulting from destruction of his property by fire.

It is the well-settled general rule of damages for any breach of contract that the damages that can be recovered for a breach are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach. Other damages are too remote. In this lies the distinction between damages for breach of contract and damages for tort, the rule as to tort being that the injured person may recover for all detriment proximately caused thereby, "whether it could have been anticipated or not." (Civ. Code, sec. 3333.) Such, as we understand it, is the rule declared by section 3300 of the Civil Code, as that section has always been construed by this court, and it is the rule enunciated in the leading case of *Hadley v. Baxendale*, 9 Exch. 341, which has been universally accepted and followed. (See *Mitchell v. Clarke*, 71 Cal. 165, [60 Am. Rep. 529, 11 Pac. 882].) As has often been suggested by writers upon this subject, the remote effects of slight causes are so beyond all possible conception of the parties to a contract, both in character and extent, that any other rule would practically preclude the making of contracts altogether, for no sane person could be expected to assume such uncertain and limitless liability. This rule does not mean that the parties should actually have contemplated the very consequence that occurred, but simply that the consequence for which compensation is sought, must be such as the parties may be reasonably supposed, *in the light of all the facts known, or which should have been known to them*, to have considered as likely to follow, in the ordinary course of things, from a breach, and, therefore, to have in effect stipulated against. The understanding and

intention of the parties in this regard must of course be ascertained from the language of the contract, in the light of such facts. (See Sutherland on Damages, sec. 45.)

Where a contract calls for the continuance of an instituted water service for the purpose of extinguishing fires, loss by fire as the consequence of a breach may, as already suggested, be reasonably supposed to have been within the contemplation of the parties. This may also be true in the event of such a service contracted to be commenced at a certain definite time in the future, especially if the special circumstances are such as to make it essential that the particular protection from fire to be thereby afforded should commence at that time, and those circumstances were made known to the person or company contracting to furnish the service. As to this, however, it is not necessary here to decide. The contract here alleged was, in effect,—1. To lay and install certain pipes through which water for general use might be supplied, and to install one fire-hydrant, through which water for use in the event of fire might be supplied; and 2. Such pipes and fire-hydrant having been installed, thereupon to commence supplying water for those purposes, and to continue supplying it at certain prescribed rates. No time whatever was prescribed for the completion of the work essential to the furnishing of such water, or for the commencement of the water service, except that it was to commence upon the installation of the necessary pipes and hydrant. We attach no importance to the subsequent "promise" of March 15, 1901, on the part of defendant, that it would "immediately commence the work" essential to the installing of the service for the various purposes designated. Giving this additional promise full force as a part of the contract between the parties, there was therein no undertaking on the part of defendant that the work so to be commenced would be completed and the water service instituted *at any certain definite time*. There was no allegation whatever as to any special circumstances known to defendant, or, for that matter, to plaintiff, making it essential to the protection of the property from fire that the contemplated service should be commenced within any particular time.

The case presented, then, is one where the parties simply agreed upon the installation and commencement of a water service for various purposes, including one hydrant to be used

for the extinguishment of possible fires, upon the installation and commencement of which the plaintiff was to commence paying, at certain prescribed rates, for the water furnished, no definite time for the commencement of such service being fixed, and no special circumstance appearing, by reason of which it might be anticipated that it was essential to the protection of plaintiff's property from fire that the service should be commenced within any particular time, or, as plaintiff claims, within a reasonable time.

Under such circumstances, it appears very clear to us that damage by fire to plaintiff's property cannot reasonably be supposed to have been within the contemplation of the parties as possible to be caused *by a failure on the part of defendant to commence the water service agreed upon*. The plaintiff not having stipulated for the limited protection against fire to be furnished thereby, to commence at or within any particular time, and, under the terms of the contract, paying for such protection only from the time of the actual commencement thereof, could not, until the actual commencement of the service, be considered as relying on such protection, or on the commencement thereof at any particular time, in the slightest degree, and there was nothing to warrant even a supposition on the part of defendant that plaintiff did so rely. The utmost that can be reasonably contended to have been within the contemplation of the parties in this regard was, that when, at some future indefinite time, the hydrant had once been installed and the service actually commenced, water would *thenceforth* be available, by means of the hydrant, for the extinguishment of possible fires, and that any failure to then have it so available, in the event of fire, might cause damage to plaintiff's property. This was the full extent of the contract of the parties, and the parties could not be understood as stipulating for such protection prior to the actual commencement of the service. This being so, whatever might be the proper measure of damage for a breach of contract in failing to install the service within a reasonable time, loss of property by fire could not be an element thereof. Until the actual assumption of the duty of such protection, damage by fire could not be held to be within the contemplation of the parties as a possible consequence of a breach, and in no legal sense of the words could such damage be held to have been

caused by the breach alleged, although if it had not been for such breach water might have been available for the extinguishment of the fire.

The case is no different in principle from one where water is furnished by contract for other than fire purposes, and a fire occurs which could have been extinguished by such water if it had been available, but, owing to some failure of the person furnishing the water, no water is available, and the property is destroyed. As already stated, although in such a case the breach is, in one sense of the words, a cause of the loss, there could be no recovery, for the water company has not assumed the duty of protecting the other's property from fire, and loss by fire is not, therefore, damage possible within the contemplation of the parties to the contract. Here, although water was ultimately to be furnished for fire purposes, the defendant had not, under the terms of its contract, assumed the duty of so protecting plaintiff's property at the time of the fire.

We are of the opinion that the amended complaint did not show any damage for which recovery might be had, and that the demurrer was therefore properly sustained.

The judgment is affirmed

Shaw, J., McFarland, J., Henshaw, J., and Lorigan, J., concurred.

[L. A. No. 1850. In Bank.—October 11, 1906.]

CITY OF LOS ANGELES, Respondent, v. A. N. DAVIDSON, Appellant.

MUNICIPAL CORPORATIONS—STREET-RAILROAD FRANCHISES—CONSTRUCTION OF ACT REQUIRING ORDINANCE—MAYOR'S VETO—INJUNCTION BY CITY.—The act of March 3, 1903, amending the act of March 11, 1901, so as to provide that after the sale of a municipal franchise for a street railroad, and the filing of the bond by the successful bidder, "the franchise shall by said governing or legislative body be granted by ordinance," etc., is to be construed with the freeholders' charter of a city, requiring all ordinances to be approved by the mayor, or to be passed over his veto; and where an ordinance

granting such franchise was vetoed by the mayor, and was not passed over his veto, and the money bid was tendered back, the city was entitled to enjoin the construction of the street railroad.

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

J. S. Chapman, and Ward Chapman, for Appellant.

W. B. Mathews, for Respondent.

McFARLAND, J.—The plaintiff is a municipal corporation, and Tenth Street is a public street lying within its boundaries. At the time of the commencement of this action the defendant was engaged in digging up part of the surface of said Tenth Street, with the intention of constructing and operating thereon a street railroad, claiming to have the franchise for the construction and operation of such railroad; and this action was brought to obtain an injunction restraining defendant from digging upon said street and from constructing or maintaining a railroad thereon. A temporary restraining order was granted as prayed for. Defendant answered, setting up fully his said asserted franchise, and praying judgment that said franchise had vested in him; that he has the right to construct and operate the railroad along said street; that plaintiff be enjoined from interfering with the construction of said railroad by defendant and from hindering him from enjoying his franchise, etc. The case was tried upon the pleadings and a stipulated statement of facts, and the court rendered judgment in favor of plaintiff, enjoining defendant as prayed for. From this judgment defendant appeals.

The main question in this case is whether defendant had a franchise to construct and operate a street railroad along Tenth Street. There is substantially no dispute about the facts; and the question here involved depends mainly on the meaning of certain legislative acts and provisions of the municipal charter of plaintiff.

On March 11, 1901, an act of the legislature was approved, entitled "An act providing for the sale of street railroad

and other franchises in municipalities," etc. (Stats. 1901, p. 265.) Section 1 of said act provides, among other things, that every franchise to construct or operate a street railroad upon any street or highway "hereafter proposed to be created by boards of supervisors, boards of trustees, or other governing or legislative bodies of any city and county, city or town within the state . . . shall be granted upon the conditions in this act provided, and not otherwise." Section 2 provides that an applicant for such franchise shall "file with the governing or legislative body" an application therefor, and thereupon said governing body shall "in its discretion,"—and must in case the application is accompanied with a certain petition of persons owning land along a street,—advertise the fact of said application in manner as provided. The advertisement must state the character of the proposed franchise to be granted; that sealed bids will be received up to a day and hour named; and that the successful bidder must pay to the municipality two per cent of the gross annual receipts of the use of the franchise. It shall further state "that the said franchise will be granted to the person, firm, or corporation who shall make the highest cash bid therefor," provided that when the bids are opened any person may raise the highest bid not less than ten per cent, and it may again be raised by others, and "said franchise or privilege shall finally be struck off, sold and granted by said governing body to the highest bidder therefor in gold coin." It is also provided that the successful bidder shall within five days after the franchise shall have been sold and struck off to him file a certain described bond.

In accordance with the provisions of the said act of March 11, 1901, the defendant herein made an application to the city council of plaintiff for a franchise to construct and operate a railroad for a distance "along Vermont Avenue to Tenth Street and thence along Tenth Street to Western Avenue." And on November 27, 1904, the council made an order that said franchise be sold for a period of thirty-nine years. In advertising and conducting the sale all the provisions of said act were complied with; and on the sixth day of February, 1905, which was the day set for opening the bids, the bids were opened and defendant in-

creased his bid ten per cent and bid seven hundred dollars for the franchise; and there being no other bid the city council did on said sixth day of February accept the said sum of seven hundred dollars and did thereupon strike off, sell, and award to the defendant herein the said franchise, and defendant immediately paid said sum of money, which was accepted by the council. (This money has, however, been tendered back to defendant, and is at his disposal.) On the next day, February 7th, defendant duly executed and presented to the council the bond required by the statute, which was approved by the council, and thereupon, on said February 7th, an ordinance was passed by the council whereby said franchise was, in form, granted to defendant. This ordinance was presented to the mayor of the city, who returned it with his veto—putting his veto on the ground that certain amendments to the charter of the city which limited the term of a street railroad franchise to twenty-one years were approved by the legislature of the state on said February 7, 1905. The council did not afterwards take any action on said veto.

The charter of plaintiff provides for, among other things, a city council consisting of one councilman from each ward. It is provided in the charter that "all legislative power of the city is vested in the council, subject to the power of veto by the mayor as hereinafter given, and shall be exercised by ordinance." It is further provided that "the enacting clause of all of the ordinances shall be substantially as follows: 'The mayor and council of the city of Los Angeles ordain as follows.' " The said act of March 11, 1901, was amended by an amendatory act approved March 3, 1903, (Stats. 1903, p. 900,) so as to provide that after the filing of the bond of the successful bidder "the said franchise shall by said governing or legislative body be granted by ordinance to the person, firm, or corporation to whom it has been struck off, sold or awarded." The said amendatory act of March 5, 1903, also amends the act of 1901 in some other particulars; for instance, the word "granted" in section 5 of the act of 1901 is changed by the act of 1903 to "awarded"; the first act does not provide for the granting of the franchise by an ordinance, but seems to assume that the franchise passes by the acts of the governing body by which it is "struck off, sold,"

etc., by the governing body, and provides that if the bidder fails to file the required bond "the award of said franchise shall be set aside," while the act of 1903 provides that upon the filing and approving of the bond "the said franchise shall by said governing or legislative body be granted by ordinance to the person," etc.

The city charter provides that "Every ordinance which shall have been passed by the council before it becomes effective" shall be submitted to the mayor, with the usual provisions that the ordinance shall not be operative unless approved by the mayor, or unless upon his veto it shall be again passed by the council by a two-thirds vote.

No doubt the legislative enactments and the charter provisions above referred to are a little confusing, and leave considerable room for the forcible argument of counsel for appellant that the franchise here in question vested in appellant by the act of the city council on February 6th striking off, selling, and awarding it to appellant. But the amendments to the act of 1901 by the act of 1903 must be construed in connection with the provisions of the city charter; and so construing them we think that the latest expression of the legislative will, as expressed in the act of 1903, was that the franchise here in question should finally pass from the sovereign to the individual only by an ordinance approved by the mayor. It is true that the provision in the act of 1903 is that the ordinance by which the franchise is to be granted shall be by "the governing or legislative body" without special mention of the mayor; but the provision must be construed in view of the legislative knowledge that by the charter all "legislative power" of the council must be "exercised by ordinance"; that the form of an ordinance includes the mayor; and that no ordinance "becomes effective" until approved by the mayor, or passed over his veto. Otherwise the amendment of 1903 providing for the granting of the franchise "by ordinance" would have to be entirely disregarded.

(We have disregarded the contention of respondent that the amendments to the charter alleged to have been approved by the legislature on February 7th are conclusive against appellants, because there is no finding or evidence that said amendments were approved as early as February 7th. We have also disregarded the contention of respondents that, by

the act of the legislature approved March 27, 1897, (Stats. 1897, p. 190,) it is expressly provided that every ordinance of a municipality providing for the grant of a franchise "shall, before it takes effect, be presented to the mayor for his approval"; because it is doubtful if such provision applies to a municipality having a freeholders' charter.)

The judgment appealed from is affirmed.

Angellotti, J., Henshaw, J., Shaw, J., Lorigan, J., and Sloss, J., concurred.

[L. A. No. 1857. In Bank.—October 11, 1906.]

**J. H. SPIRES, Respondent, v. CITY OF LOS ANGELES
et al., Appellants.**

**PUBLIC PARK—USE FOR PUBLIC LIBRARY—ADMINISTRATION PURPOSES—
INJUNCTION.**—The erection of a building for a public library in a public park, with rooms therein as a meeting-place for the board of library directors of the city, is a legitimate use of a portion of the park which cannot be enjoined at suit of an abutting owner and taxpayer; but the use of the library building for administration purposes, such as for rooms for the board of education, or for any other municipal body, may be enjoined.

APPEAL from a judgment of the Superior Court of the County of Los Angeles. D. K. Trask, Judge.

The facts are stated in the opinion of the court.

W. B. Mathews, and Herbert J. Goudge, for Appellants.

Charles Wellborn, C. E. Woodside, Eugene Overton, H. T. Lee, and H. W. O'Melveny, for Respondent.

LORIGAN, J.—The plaintiff, a resident and taxpayer of the city of Los Angeles, and the owner of certain property abutting on what is claimed to be a public park in said city, brought this suit in injunction against the city of Los Angeles, the mayor and common council, the members

of the board of library directors, and the members of the board of park commissioners of that city, to restrain them from erecting a public library on a tract of land owned by said city of Los Angeles bounded by Fifth, Hill, Sixth, and Olive streets in that city, and known as Central Park, on the ground that the city, as owner of said property, had dedicated it to the use of the public for park purposes, and that such purpose would not permit erection therein of a public library building.

The Central Park in question is six hundred by three hundred and thirty feet in size, and it was proposed by the municipal authorities to use a space in the center thereof, one hundred by one hundred and fifty feet, upon which to erect a public library.

The trial court found that the land in question had been set apart and dedicated by the city authorities of Los Angeles for the use of the public as a public park, and that its official name was "Central Park," and that ever since December 11, 1866, it had been maintained and used by the people of the city of Los Angeles exclusively as a park.

Judgment was rendered for the plaintiff in accordance with the prayer of the complaint, and the defendants appeal to this court therefrom.

The appeal is from the judgment, accompanied by a bill of exceptions.

The sole points presented on this appeal are whether,—1. The block in question was ever dedicated by the city of Los Angeles as a public park; or 2. If it was so dedicated, would the erection therein of a public library be foreign to the purposes for which said tract was dedicated, inconsistent with its use by the public, and an invasion of public right.

Much of the evidence in the case was addressed to the first proposition, whether there was in fact a dedication by the city of the block as a public park; but in view of the conclusion we have reached on the second point, we do not deem it necessary to pass upon that question.

If it be conceded that there was a dedication of the square as "a public place forever for the enjoyment of the community in general," as the principal ordinance on which reliance is based as showing dedication declares, still we think that the erection therein of a public library for the use of the same public who

are entitled to use the park is not only not inconsistent with the purposes for which the park was dedicated, but is really in aid and furtherance of its enjoyment by the public.

It is to be remembered that the dedication here is not one made by a private individual for a specific public use, where the rule of strict construction of the terms of the grant is to be applied. The land which it is claimed here was dedicated as a public park was land acquired by the city as successor to the pueblo of Los Angeles, to which it had been granted by the government of Spain. The city of Los Angeles, when the alleged dedication was made, was the owner in fee, and its dedication was for a general public use,—namely, “as a public place forever for the enjoyment of the community in general.” This was comprehensive language, and in construing the grant, or rather the extent of the terms of the dedication, no narrow and strict construction should be applied to limit the city in the uses to which the property dedicated may be devoted, as long as they are such as tend to further and promote the enjoyment of the people under the general dedication of the land for their benefit. And that the establishment of a public library, to which the visitors to the park have access, is consistent with such public enjoyment, and tends to enlarge it, we have no doubt.

As matter of public knowledge, we are aware that the erection of hotels, restaurants, museums, art-galleries, zoological and botanical gardens, conservatories, and the like in public parks is common, and we are not pointed to any authority where it has been regarded as a diversion of the legitimate uses of the park to establish them, but, on the contrary, their establishment has been generally recognized as ancillary to the complete enjoyment by the public of the property set apart for their benefit. To instance, in Central Park in New York City there is a museum of natural history and a metropolitan art museum; and in Golden Gate Park in San Francisco, a museum, children’s playground, and buildings used in connection with it, and a conservatory. We mention simply these parks and particular features devoted to the public enjoyment, although many other parks might be mentioned where similar buildings have been erected.

Now, we are at a loss to perceive why, if the erection of museums, conservatories, and art galleries is sustained as in

aid of the enjoyment of property dedicated to the public, the erection of a public library on a public park should be prescribed. Certainly the latter is as much in aid of the enjoyment of the public as the former, and, as far as the right of public access to it is concerned, stands on entirely the same footing. Of course, if a municipality were undertaking to establish on this property a city hall, fire-engine station, hospital, or jail; endeavoring to devote the property (assuming it was dedicated for a public park) to the erection of municipal buildings or offices or structures for use in the transaction of municipal business, a different question would be presented, and there would be little hesitancy in holding that it could not do so. But using a portion of said dedicated property for a museum or art-gallery or conservatory or library, designed for the recreation, pleasure, and enjoyment of the community in general, is an entirely different proposition, and is a distinction generally recognized by the authorities. Public buildings such as we have last mentioned are for the benefit of the same public that enjoys the advantages of the park; there is nothing exclusive about it, and they are in fact erected and maintained as additional and ancillary means to promote the recreation and pleasure of those to whom the enjoyment of the park is devoted.

And that among the buildings which may be erected within a public park in aid of and for the better enjoyment of the public, a public library is included, is settled by authority.

An interesting and leading case upon the subject is the *Attorney-General v. Corporation of Sunderland*, 2 Ch. Div. 634. This case directly involved the right of a municipality to erect a public library in a public park. A tract of land was purchased by the borough of Sunderland as an extension to an existing park, and was conveyed to it by a deed which declared that the land was to be used "only for public walks and pleasure-grounds." Subsequently the corporation resolved to employ a quarter of an acre as a site for the erection of town buildings, including accommodations for a museum and a library and public offices. Thereupon suit was brought by the attorney-general at the relation of certain inhabitants and ratepayers of Sunderland to have the corporation restrained from appropriating any portion of the park "as sites or a site for the erection of any town buildings or for any

erection or building which is not needed, or incidental to, the maintenance of the park as public walks or pleasure-grounds." The vice-chancellor before whom the case was first argued held that the municipal corporation defendant had power to erect upon the land in question a museum and conservatory, but not any municipal building or a library or school of art, and pursuant to this decision a decree was made restraining the corporation from erecting any town buildings or any building other than a museum or conservatory. The corporation appealed from this decree, and the court of appeals modified it by directing that the injunction should not "extend to a free public library, museum or conservatory open for the use, convenience and recreation of the persons frequenting such walks and pleasure-grounds." In reaching this conclusion opinions were expressed by the justices of the court, James, L. J., after agreeing with the vice-chancellor that the corporation had no authority to use any land of the park as the site of a town hall, saying with reference to the erection of the other buildings involved: "The original park was appropriated as 'a place of recreation,' and, according to the act under which the land now in question was acquired, it must be used 'as public walks or pleasure-grounds.' These words are not to be construed too narrowly. It is admitted by the information that some buildings are allowable, and the prayer is, as it seems to me, quite correct. The corporation is in the position of a trustee, and the question is whether in building a museum and library it is improperly executing a trust. The primary object of the trust is to provide a place of enjoyment and recreation; nothing is improper which conduces to that object, and we ought not to quarrel with anything which the corporation, in a reasonable exercise of their discretion, consider conducive to it. It is admitted that the erection of a conservatory is allowable, and it is an erection which you would expect, as a matter of course, to find in first-rate pleasure-grounds. The erection of a free museum containing botanical specimens and other curiosities appears also to be unobjectionable. A library into which people may turn if the weather becomes unfavorable also seems allowable if *bona fide* intended for the use of persons frequenting the grounds, as it will tend to promote the convenient use of the grounds. I think, therefore, that the exception in the order ought to be extended, so that the erection of a free

library may not be prohibited." Justice Melish, concurring, said: "I am of opinion, therefore, that no part of it can be used as the site of a town hall and offices. Can, then, any part of it be applied as a site for a museum, library, and conservatory? If the corporations were to acquire land for those purposes only, I think that such a purchase would not be within the act; but public walks and pleasure-grounds having been laid out on a piece of land containing twenty-five acres, it is proposed to apply a quarter of an acre for the erection of those buildings. The question, then, arises whether this application of a small portion of the ground is not reasonably incidental to the main object, and whether it will not improve the grounds in their character of public walks and pleasure-grounds. I am of opinion that it will, for it will increase the enjoyment of persons who go to walk there, and may induce more persons to frequent the grounds. I think that we ought not to put a narrow and strict construction upon the words, but that we ought to see whether the trustees, in what they are proposing to do, are *bona fide* carrying out the object of the trust." And Justice Baggallay expressed himself to the same effect: "The purposes of the section are that the land should be used for public walks and pleasure-grounds, and I should much regret to be obliged to hold that applying a small portion of it for a museum, library, and conservatory, was inconsistent with this purpose. I cannot conceive anything more likely to conduce to the enjoyment of the walks and pleasure-grounds than the having these erections attached to them, and I agree with the lord justices that the order should be varied to the extent mentioned."

It is insisted, however, by respondent that if this rule, supported by universal custom, and announced in the case just cited, obtains, it can only apply when but a small portion of a public part is taken, and not when the site to be used is so large as to result practically in the destruction of the park as a pleasure-ground for the recreation and enjoyment of the public. This argument concedes the general right of the municipality to take a part of the park for buildings erected in aid of the enjoyment of the park by the public, and only insists that it has its limitations.

But conceding the limitation, we have nothing to do with its application here. It is not apparent that the erection of this

library will tend to the destruction of the park at all; the site for a library is relatively but a small portion of it, and, as we have seen, the erection of such a building therein is in aid of the public enjoyment of the entire park. Aside from this, however, no issue on this point was made in the court below, the contention of plaintiff there being that, as the park in question was dedicated to the use of the public as a pleasure ground, the city had no authority whatever to devote a portion of it, large or small, to a public library. No point was made as to any limitation on the right of a city by reason of the size of a site proposed to be taken in a public park for a library, but the right to do so was denied under any circumstances.

There is nothing further to be said in this matter. Under the view we entertain on the subject, the city of Los Angeles has a right, notwithstanding it be conceded that Central Park was dedicated for the benefit and enjoyment of the public, to build a public library on it, and the court was in error in granting a decree to plaintiff enjoining it and its officers from doing so. This view, of course, necessitates a reversal of the judgment. While the municipality has the right to establish upon the public park a public library it cannot devote any of the rooms therein to administration purposes. It appears from the evidence set forth in the bill of exceptions accompanying this appeal that it is the purpose of the city to provide rooms therein as a meeting-place for the board of library directors of such city, and that application has been made to such board of directors to provide rooms therein for the board of education. As far as the board of directors is concerned, this would seem permissible on account of their control of the library. But as to the board of education this cannot be done. The library building can be used for strictly library purposes only, and cannot be devoted to the establishment of municipal offices therein or used for municipal administration purposes other than as indicated relative to the board of library directors.

If any part of such building could be used for one administration purpose, it might gradually be devoted to another. If one municipal board or municipal officer of the city having no direct relation to the library can be located therein, so may another, and so the building which the city has a right

to erect as a library building solely in aid of the public enjoyment of the park may be gradually invaded for administration purposes and ultimately devoted to those purposes.

Upon a new trial it shall be the duty of the trial court under the views we have suggested to ascertain whether the city of Los Angeles proposes to use the library to be erected for any municipal purpose at all, except as to a meeting-room for said board of library directors, and if so to enjoin such use; the right of the city to erect the proposed library on the public park to be limited to its use solely for public library purposes. The judgment is reversed and the cause remanded for a new trial.

The appellant is entitled to costs on appeal.

Shaw, J., Angellotti, J., Sloss, J., McFarland, J., Beatty, C. J., and Henshaw, J., concurred.

[Crim. No. 1328. In Bank.—October 13, 1906.]

In Re ANDREW PFAHLER, on Habeas Corpus.

MUNICIPAL CORPORATIONS — FREEHOLDERS' CHARTER — INITIATIVE AND REFERENDUM — CONSTITUTIONAL LAW — REPUBLICAN FORM OF GOVERNMENT.—A freeholders' charter of a municipal corporation framed and adopted under the provisions of section 8 of article XI of the constitution, and approved by the legislature, may incorporate the procedure known as the "initiative and referendum," so as to authorize the majority of the electors at the ballot-box to participate directly in the enactment of local laws; and such procedure is not in violation of any provision of the state constitution, nor of the provision of section 4 of article IV of the constitution of the United States, providing that "The United States shall guarantee to every state in this Union a republican form of government." That section does not prohibit the direct exercise of legislative power by the people of a subdivision of the state in strictly local affairs.

ID.—PRACTICAL CONSTRUCTION OF FEDERAL PROVISION.—The provision of the federal constitution guaranteeing a republican government to each state in the Union was manifestly intended to apply only to the state as a whole. It was framed and adopted with full knowledge that a system of local government in town meetings obtained in some of the states; and that system was continued

under the constitution, without any question as to its validity, and it is still found not only in several of the New England states, but also in other states. There are besides numerous other instances of the direct exercise of legislative power by the people in local affairs, authorized by the state.

ID.—QUESTION OF STATE POLICY.—It is a question of local policy with each state to determine what its political subdivisions shall be, and what shall be the extent and character of their powers, and the manner of their exercise, and to what extent the people of a municipality shall be allowed to participate directly in the governmental function of legislation therefor. In the determination of those questions the entire body politic known as the state has absolute power, and the courts have nothing to do with that question of policy.

ID.—GRANT OF LOCAL POLICE POWER BY CONSTITUTION—MODE OF EXERCISE.—Section 11 of article XI of the constitution of this state, providing that "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws," while it grants a local police power, grants it to the body politic and not to the city council as such, and does not determine the mode of the exercise of such power. The matter is left to the determination of the city or town, in accordance with the provisions of its charter.

ID.—DELEGATION OF LEGISLATIVE POWER TO MUNICIPALITIES.—As to such local legislation as may not be included in the constitutional grant, the creation of municipalities, with power to exercise local self-government is not a forbidden delegation of legislative power, it being within the constitutional power of the legislature to provide for municipal corporations, and the approval by the legislature of a freeholders' charter delegating legislative power to the city is expressly authorized by the constitution.

ID.—EXPENSE OF ELECTION—INDEBTEDNESS OF CITY—PRESUMPTION.—The objection that the expense of an election may prevent the proper exercise of the police power, by making the city indebtedness thereby incurred in excess of the provision of section 18 of article XI of the state constitution, is not tenable. It must be presumed that the municipality will provide the funds necessary for the administration of its government.

ID.—DELEGATION OF POWER TO SPECIAL COMMISSION.—The initiative and referendum by the people is not within the provision of section 13 of article XI of the constitution prohibiting the delegation of power to "a special commission" to perform any "municipal functions." The aggregate body of qualified electors cannot, under our constitution, be held to be "a special commission" within the meaning of that provision.

ID.—FREEHOLDERS' CHARTER NOT AFFECTED BY MUNICIPAL CORPORATION ACT.—The fact that the initiative and referendum conferred in a

freeholders' charter is not conferred in the General Municipal Corporation Act does not affect its validity. As to municipal affairs, it is sufficient that a charter is consistent with the constitution. The provision of the constitution for a freeholders' charter is distinct from the grant of power under the Municipal Corporation Act, and cannot be affected by its provisions.

USE OF WORDS "LEGISLATIVE AUTHORITY."—The use of the words "legislative authority" in section 8 of article XI as to proposed amendments to freeholders' charters, was not intended to define the powers of that body or place it in a position where it would be beyond restrictions by the organic law of the city.

ID.—TITLE OF ACT APPROVING AMENDMENTS TO FREEHOLDERS' CHARTER.

—Where an initiative amendment was one of thirteen proposed amendments to the charter of the city ratified by its electors, the approval of the amendments as a whole by a resolution the title of which stated it was a resolution "approving thirteen certain amendments to the charter of Los Angeles," etc., was not in violation of the requirement that every act shall embrace but one subject which shall be expressed in its title. The method pursued was strictly in accord with the provision of section 8 of article XI of the constitution.

APPLICATION for Writ of Habeas Corpus to the Chief of Police of the City of Los Angeles.

The facts are stated in the opinion of the court.

Robert A. Todd, for Petitioner.

C. W. Pendleton, E. S. Torrance, Earl Rogers, and Luther G. Brown, *Amici Curia*, also for Petitioner.

William B. Mathews, Herbert J. Goudge, and Hunsaker & Britt, for Respondent.

W. H. Davis, Wright & Wright, Allen G. Wright, William J. Danforth, W. G. Burke, City and County Attorney for San Francisco, and W. D. Burchard, Assistant, *Amici Curia*, also for Respondent.

ANGELLOTTI, J.—The petitioner is held in the custody of the chief of police of the city of Los Angeles, under a warrant issued upon a complaint charging him with a violation of the provisions of a certain purported ordinance of said city, which ordinance prohibits, except within certain

defined limits, the killing or slaughtering of animals the flesh of which is to be sold or offered for sale or eaten. There is no claim that the complaint does not state facts sufficient to show a public offense under the provisions of said ordinance, nor is there on the part of the petitioner any claim that the ordinance, if legally enacted, was not a reasonable and valid exercise of the police power vested in such city. Petitioner's claim is that the purported ordinance has never been legally enacted.

The ordinance was not adopted in the ordinary way, by vote of the city council and approval of the mayor, but by the electors of the city at a general election, at which it was submitted for their approval or rejection, such submission having been compelled by a petition submitted to the council signed by electors equal in number to at least five per cent of the vote cast for all candidates for mayor at the last preceding election. The procedure was in strict accord with what is known as the "initiative" provision of the charter of Los Angeles, which, together with what is known as the "referendum," was made a part of such charter by amendments ratified by the people of such city at an election held December 1, 1902, and approved by the legislature of the state on January 30, 1903. (See Stats. 1903, pp. 555, 572.)¹ The real question presented by this proceeding is, then, as to the validity of this provision of the charter.

The city of Los Angeles is a municipal corporation operating under a freeholders' charter, framed and adopted under the provisions of section 8 of article XI of the constitution, and approved by the legislature January 31, 1889, (Stats. 1889, p. 445). By that charter the legislative power of the city was vested in a council provided for by such charter, subject to the power of veto and approval by the mayor. The initiative amendment of 1902 and 1903, so far as material to the question here presented, provides substantially as follows: Any proposed ordinance may be submitted to the council by a petition signed by registered electors of the city. If such petition is signed by electors equal in number to fifteen per cent of the entire vote cast for all candidates for mayor at the last preceding general election at which a mayor was elected, and contains a request that said ordi-

nance be submitted forthwith to a vote of the people at a special election, the council must either,—1. Pass such ordinance without alteration (subject to a referendary vote as elsewhere provided), and if, when passed, it is vetoed by the mayor, and on reconsideration fails of passage by the council, submit it to a vote of the people at a special election; or 2. Call a special election, at which said ordinance, without alteration, shall be submitted to a vote of the people. If the petition is signed by electors equal in number to at least five per cent, but less than fifteen per cent of such vote, the ordinance shall be submitted to a vote of the people at the next general municipal election that shall occur at any time after thirty days from the date when the sufficiency of the petition is officially determined. "If a majority of the qualified electors voting on said proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city; and any ordinance proposed by petition or which shall be adopted by a vote of the people cannot be repealed or amended, except by a vote of the people. . . . The council may submit a proposition for the repeal of any such ordinance, or for amendments thereto, to be voted upon at any succeeding general election; and should such proposition receive a majority of the votes cast thereon at such election, such ordinance shall be repealed or amended, accordingly."

The accompanying referendum amendment provides: "No ordinance passed by the city council (except when otherwise required by the general laws of the state or the provisions of the charter, respecting street improvements, and except an ordinance for the immediate preservation of the public peace, health or safety, which contains a statement of its urgency, and is passed by a two-thirds vote of the council, but no grant of any franchise shall be construed to be an urgency measure, but all franchises shall be subject to the referendary vote herein provided for), shall go into effect before thirty days from the time of its final passage and its approval by the mayor." It is further provided therein that a protest against such ordinance filed during said thirty days, signed by electors equal in number to at least seven per cent of such vote, shall have the effect of suspending the ordinance from going into operation and require the council

to reconsider the same, and, if that body does not entirely repeal it, submit it to the electors at a general or special election, the ordinance to go into effect or not as the majority of the electors voting thereon shall decide.

While no question as to the validity of the referendum amendment is directly involved here, we have briefly set forth its provisions, as the two amendments are simply part of one general plan or scheme looking to a more direct control of local legislation by the people of the city, and, so far as the principal objections here made are concerned, must stand or fall together. Those objections go to the question of the validity, under the provisions of the constitution of the United States and our own constitution and laws, of any provision in a municipal charter which authorizes the electors of the municipality to participate directly in the enacting of local laws. These two amendments, the initiative and the referendum, have the same effect in this respect. In each, it is the vote of the electors at the ballot-box that finally determines whether or not a proposed measure shall be a law at all, and it can make no difference in principle whether the proposition originates with electors or with the council. In each, the electors by their vote at the ballot-box directly exercise legislative power. By these amendments the electors are, except in certain specified cases, given an effectual veto power as to all ordinances approved by the council, and are clothed with authority paramount to that of the council to directly enact such local legislation as they may deem expedient, where the council declines to enact the same.

The charter provision relative to the initiative, which is substantially similar to recently enacted provisions in the charters of other municipalities of the state, is vigorously attacked by counsel for petitioner and other attorneys appearing as *amici curiæ*, who claim to see in this curbing of the power of the ordinary legislative body of the city, this vesting in the electors of a municipality the power to enact measures which the legislative body refuses to approve, a violation of our own constitution, and a forbidden departure from the republican form of government guaranteed by the constitution of the United States.

The latter objection may appropriately be first considered. Its sole foundation is section 4 of article IV of the constitution of the United States, which is as follows: "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence." The contention here is, necessarily, that any attempt by a state to provide for a direct exercise of legislative power by the people, instead of by representatives of the people elected or appointed for that purpose, is, even in purely local affairs, inconsistent with the republican form of government guaranteed by this provision, and ineffectual for any purpose, the theory being that such provision requires a purely representative form of government not only in the state itself, but also in all its subdivisions, leaving no vestige of power of direct legislation in the people themselves.

If we assume that this claim presents a judicial question rather than a political one to be determined by the Congress of the United States (see, however, *Luther v. Borden*, 7 How. 1; *Taylor v. Beckham*, 178 U. S. 548, [20 Sup. Ct. 1009]), we are brought to a consideration of the question as to what was meant by this guarantee of a republican form of government. For all the purposes of this proceeding, it is sufficient to hold, as we do, that it does not prohibit the direct exercise of legislative power by the people of a subdivision of a state in strictly local affairs. In saying this, we do not wish to be understood as intimating that the people of a state may not reserve the supervisory control as to general state legislation afforded by the initiative and referendum, without violating this provision of the federal constitution. That they may do so has been decided by the supreme court of Oregon in the case of *Kadderly v. Portland*, 44 Or. 118, [74 Pac. 710, 75 Pac. 222], which appears to be the only case in which that question has been directly presented. (See, also, *Hopkins v. City of Duluth*, 81 Minn. 189, [83 N. W. 536].) However this may be, it is clear that the direct participation of the electors of subdivisions of a state in legislation as to local affairs was never intended to be prohibited by the framers of the federal constitution, or the

states adopting the same, and that such power has been exercised by them, where not inconsistent with provisions of their state constitution, in innumerable instances, from the institution of our government to the present day, without interference of any kind on the part of the federal government.

As is universally recognized by courts and writers on constitutional law, it must be assumed that there was nothing in any of the forms of government prevailing in the various states at the time of the adoption of the constitution that was violative of the provisions under discussion. Discussing this question, and speaking of the forms of government then existing in the various states, the supreme court of the United States said, in *Minor v. Happersett*, 21 Wall. 162, 175, 176; "These governments the constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the states to provide. Thus we have unmistakable evidence of what was republican in form within the meaning of that term as employed in the constitution." It is unnecessary to here do more than to refer to the widely known and well-recognized form of local government that prevailed in several of the states at the time of the adoption of the constitution, known as the New England town government, under which all the inhabitants in town meeting directly exercised such legislative power as was essential to the conduct of local affairs. No difference material to the objection under discussion is to be found in the fact that they did this in public meeting, rather than by secret ballot at the polls, as under the provision before us. The objection here made is that, under the republican form of government guaranteed by the federal constitution, such power cannot be directly exercised by the people, and, so far as that objection is concerned, if the people may legislate directly in town meeting, they may do so by their votes at the polls. The constitutional provision was framed and adopted with full knowledge of this system of local government that then obtained in four of the states, and that system was continued under the constitution, without any question as to its validity. It is still to be found not only in several of the New England states, but also in other states (see 1 Bryce's *American Commonwealth*, pp. 594, 601, 605; 1 Dillon on *Municipal Corpora-*

tions, sec. 258), and we are not aware that any suggestion has ever been made that this form of local government is prohibited by the federal constitution. Other instances practically without number of the direct exercise of legislative power by the people in local affairs authorized by the state might be noted. As suggested in the briefs, the forms of local government in this country have been most varied, running all the way from the pure democracy of the town-meeting form of government up to such absolute control by the legislature of the state as deprived communities of any voice in their local affairs. It is apparent from this condition of affairs, existing continuously from the moment of the adoption of the constitution, that, if there is anything therein inconsistent with a republican form of government, within the meaning of these words as used in the federal constitution, the constitutional guarantee was intended to apply only to the form of government for the state at large, and not at all to the local government prescribed by the state for its municipalities and other subdivisions.

Whatever may be said as to the former, the latter is undoubtedly true. It is clearly a question of local policy with each state what shall be its various political subdivisions for purposes of internal government, and what shall be the extent and character of the powers of those subdivisions and the manner of their exercise. The power of a state in such matters is absolute. (See *Clairborne v. Brooks*, 111 U. S. 400, [4 Sup. Ct. 489]; *Forsyth v. Hammond*, 166 U. S. 506, [17 Sup. Ct. 665].) Where the authority of the electors of a municipality or other subdivision of a state to directly legislate in a matter of purely local concern is denied by a state court, it is denied solely upon the ground that the state constitution or statutes forbid the exercise of such power, as in *Elliott v. Detroit*, 121 Mich. 611, [84 N. W. 820], and many cases cited by petitioner. (See Cooley on Constitutional Limitations, 7th ed. pp. 165, 166; Dillon on Municipal Corporations, sec. 44 and note.) The extent to which the people of a municipality shall be allowed to directly participate in the governmental function of legislating therefor in local or municipal affairs is therefore purely a question of state policy, in the determination of which the state is not restricted by any provision of the federal constitution.

In thus speaking of the state, we mean not the legislature of the state, or the executive, or the judiciary, but the entire body of the people, who together form the body politic, known as the "state." (*Panhallow v. Doane's Admr.*, 3 Dall. 93, [Fed. Cas. No. 10,925]; *Brown v. State*, 5 Colo. 499.)

Coming to a consideration of the contention that the initiative amendment is in violation of the constitution and laws of this state: There is, of course, no doubt as to the possession by the municipality of Los Angeles of legislative power. By section 11 of article XI of the constitution, providing that "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws," the people of the state "have made a direct constitutional grant of the police power of the state to every municipal corporation for local purposes." (*Denninger v. Recorder's Court*, 145 Cal. 629, 631, [79 Pac. 360]; *Ex parte Lacey*, 108 Cal. 326, 328, [49 Am. St. Rep. 93, 41 Pac. 411]; *Ex parte Roach*, 104 Cal. 272, 276, [37 Pac. 1044].) As to such local legislation as may not be included in this constitutional grant, if it be assumed that the legislative power of the municipality operating under a freeholders' charter finds its source in any grant from the legislature, there is in this no forbidden delegation of the lawmaking power vested in the legislature. As said in *Stoutenburgh v. Hennick*, 129 U. S. 141, [9 Sup. Ct. 256], "While the rule is fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity." While the power so granted by a legislature may be called a delegated power, "the right to so delegate all powers of a municipal nature is expressly given to the legislature when, by the constitution, it is authorized and directed to provide for municipal corporations." (*Hellman v. Shoulters*, 114 Cal. 136, 149, [44 Pac. 915, 45 Pac. 1057].) So that if we assume for the purposes of argument that the legislature, in approving by concurrent resolution a charter framed by any

city containing more than three thousand five hundred inhabitants under section 8 of article XI of the constitution, delegates to the city any local legislative power, it is a delegation of legislative power that is expressly authorized by the constitution.

We do not understand that there is any claim that the city of Los Angeles—and by the term “city” we mean the municipal corporation, and not any officer or officers thereof—is not vested with legislative power, both under the constitutional provision quoted above and the freeholders’ charter framed by the constitution and approved by the legislature, except in so far as it is urged that the word “city” in such constitutional grant to “any county, city, town,” etc., must be construed as meaning some board or officers of the city. Manifestly, there is nothing in this claim. The grant to the “city” is a grant to the municipal corporation itself (*Denninger v. Recorder’s Court*, 145 Cal. 629, 631, [79 Pac. 360]), the artificial body created by the laws made up of the people of the territory comprising the same organized as a body politic, and there is no authority that would warrant a different construction. The common council or other local legislative body and other charter officers do not constitute the “city,” but are merely agents or officers of the city. (1 Dillon on Municipal Corporations, 3d ed., secs. 21, 40.) Legislative power has been properly granted or delegated by the state to the city. We are not here concerned, then, with the doctrine asserted by counsel for petitioner to the effect that the power to make laws conferred by the constitution on the legislature cannot be delegated by the legislature. The question here is simply whether it is competent, under our constitution and laws, to vest in the electors of a city, by the charter thereof, such right to directly participate in the exercise of the legislative power granted by the state to the city as is given them by the initiative amendment of the Los Angeles charter.

It will not be questioned that the charter of the city, whether it be the special act of incorporation authorized by our old constitution, the General Municipal Corporation Act enacted under our existing constitution, or the freeholders’ charter, is the appropriate place in which to provide where the legislative power of the city shall be vested, and the

manner of its exercise. One of the most important and essential offices of the charter is, and always has been, appropriate provision in this behalf. (See 1 Dillon on Municipal Corporations, sec. 39.) Our constitution declares that when a freeholders' charter is finally approved by the legislature it "shall become the organic law of the city" (sec. 8, art. XI), and such a charter has elsewhere been aptly termed the local constitution of the city. As such, provisions as to the distribution of the governmental functions, and the manner of their exercise, obtain, so far as the same are consistent with the constitution of the state. It has already been held by this court that the manner of enacting municipal ordinances and resolutions is unquestionably a municipal affair (*Morton v. Broderick*, 118 Cal. 474, 487, [50 Pac. 644]), and, therefore, under section 6 of article XI of the constitution, as amended in 1896, the provisions of a city charter in regard thereto are paramount to general laws of the state. When by section 8 of article XI of the constitution, every city containing more than three thousand five hundred inhabitants is authorized to frame "a charter for its own government," which, when ratified by the electors and approved by the legislature by concurrent resolution, "shall become the organic law" of the city, the city is authorized to make, subject to the approval of the legislature, such provision as it deems best for the exercise of the legislative power confided to it by the state, the only limitation being that the provision made must not be a violation of our state constitution. The provision so made may of course be changed by amendments to the charter, framed, ratified, and approved in the manner provided for the adoption of the original charter. (Const., art. XI, sec. 8.)

Wherein does the method prescribed by the initiative amendment violate any provision of our constitution?

The specific constitutional provisions pointed out by petitioner as violated by this amendment are two,—namely, sections 11 and 13 of article XI.

Section 11 of article XI of the constitution has already been quoted. It is the section granting the police power of the state to any municipal corporation of the state for local purposes. One of petitioner's points appears to be that this is a direct grant to the council or other legislative body of

the city or town, and that the direct exercise of legislative power by the people is inconsistent therewith. As already stated, the grant is to the municipality itself, the people in their organized condition as a body politic, and neither this nor any other provision of the constitution intimates as to how this power is to be exercised. That is left to be provided for in the "organic law" of the city, and the power is vested just where it is placed by the charter, and is to be exercised as therein provided. It is solely by virtue of the provisions to that effect in the city charter of Los Angeles, that the council of that city may exercise any of the legislative power of this city whatever (*Odd Fellows' Cemetery Assn. v. City and County of San Francisco*, 140 Cal. 226, 230, [73 Pac. 987]), and it may exercise only such power in that regard as it is authorized to do by the charter.

The *Odd Fellows' Cemetery* case, cited above, is cited by petitioners as authority for the proposition that the constitutional grant is to the council, this court having said therein: "All the legislative power of the city is by the charter vested in the board of supervisors. (Art. II, chap. 1, sec. 1.) By virtue of this clause the constitutional grant of the police powers of the state to the city goes directly to and vests in the board, which thereby becomes possessed of the right to exercise within the city limits the entire police power of the state, subject only to the control of general laws." It is here pointed out that the San Francisco charter contained provisions relative to the initiative substantially similar to those of the Los Angeles charter, and it is claimed that the decision must be taken as declaring that all of the legislative power of the city was in the board of supervisors, notwithstanding the presence of other provisions in the charter giving the electors certain powers in that regard. There was no question in that case as to the validity of the initiative provision of the charter, and what was said therein was said solely with reference to the right of a city to exercise within its limits the entire police power of the state, notwithstanding a certain provision of the charter which was claimed to limit the power. It was held that nothing contained in the charter could affect the grant made by the constitution, and that the city, under such constitutional grant, had the right to exercise the whole police power of the state so far as

local regulations were concerned, subject only to the control of general laws. What was said in the case must be read in the light afforded by a knowledge of the precise question under consideration, and, so read, the quotation above set forth is direct authority upon the proposition that the legislative power of a city operating under a freeholders' charter is just where it is placed by the charter.

The effect of the provisions of the Los Angeles charter, as amended, is to give the legislative power vested in the city to the council and mayor, *subject to such control by the electors as is given them by the initiative and referendum provisions.*

The reserved power of the electors to directly enact such ordinances as the council refuses to enact, as well as their power to effectually veto ordinances adopted by the council, is made paramount to the power of the council and mayor, the council being without power to repeal or amend an ordinance so enacted, and the objection that under the initiative we have "two equal co-ordinate lawmaking bodies, the one absolutely independent of the other," is therefore without foundation. This feature renders the decision in *Ex parte Anderson*, 134 Cal. 69, [86 Am. St. Rep. 236, 66 Pac. 194], a decision strongly relied on by petitioner, inapplicable, for the only thing decided therein was that there could not be under our system of government two equal, co-ordinate law-making powers, "each existing without any restrictions the one upon the other."

It is urged that the effect of the provisions of the initiative amendment is to interfere with and suspend the exercise of the police power granted by section 11 of article XI, in that as an ordinance adopted by the people is repealable or amendable only by the people, and as special elections on such questions can be held only at intervals of six months, and the council itself can submit propositions for repeal or amendment only at a general municipal election, the making of necessary changes in the local laws of a police nature may be unreasonably delayed. The amendment does not purport to restrict or suspend in the slightest degree the exercise of the police power vested in the municipality, having reference solely to the manner of its exercise. Any ordinance enacted by the people may at any time be repealed or amended in the

manner provided in the charter. The rule against the suspension of the police power invoked by petitioner means no more than that the power is a continuous one, reposed somewhere, and one that cannot be barred or suspended by contract or irrepealable law, and never has been held to mean that a law enacted in the exercise of the police power must ever be open to instantaneous alteration. There are provisions in the nature of police regulations in the state constitution itself, and these cannot be repealed or amended except by the slow process of amending the constitution. The legislature of the state at each of its biennial sessions enacts numerous laws in the exercise of the police power of the state, which laws can be repealed or amended only at a succeeding biennial session, except in the rare case of an extra session. The freeholders' charters of the various cities of the state contain many provisions which are essentially police regulations, and these can be amended or repealed only with the assent of the majority of the electors at an election, which elections can be held only at intervals of two years (*Harrison v. Roberts*, 145 Cal. 173, 179, [78 Pac. 537]), and with the approval of the state legislature. So far as the objection here made is applicable to the provisions in city charters, it was overruled in *People v. Williamson*, 135 Cal. 415, 417, 418, [67 Pac. 504]. So far as this objection is concerned, there can be no distinction in principle between the case of a provision in the nature of a police regulation in the city charter and one to the same effect in an ordinance. In each case it is ever amendable or repealable in the manner provided by the organic law—in the one case the organic law of the state, in the other the organic law of the city. This, as was said in *People v. Williamson*, must satisfy the courts. The same objection might, as is suggested, be made with the same degree of force to the numerous provisions in freeholders' charters and acts of the legislature relative to municipal corporations which prohibit the passage of an ordinance on the day of its introduction, or prevent its taking effect until after publication.

The claim that the power to make police regulations upon a subject covered by an ordinance adopted by the people is taken from the city by the adoption of such ordinance finds its source in the erroneous assumption, which is the basis of many of

petitioner's arguments, that the city council is the "city."

It is urged that the initiative and referendum amendments are hopelessly in conflict, in that under the referendum amendment certain emergency ordinances take effect immediately on passage, and need not be referred to the people, while there is no exception declared in the initiative amendment. There is no claim that any emergency ordinance passed by the council is in conflict with the ordinance here involved, and it is unnecessary here to determine what the situation would be in such event. Obviously, however, the law would be construed either as making the emergency ordinance paramount, and precluding the application of the initiative to the subject-matter thereof, or as making the initiative ordinance paramount. We cannot see any legal objection to either method, or any unconstitutional interference by either with the exercise of the police power.

It is suggested that the proper exercise of the police power may be prevented by reason of the absence of sufficient funds to pay the expense of an election necessary to the adoption of an ordinance which repeals or amends some prior ordinance adopted by the people, section 18 of article XI providing that no county, city, etc., "shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two thirds of the qualified electors," etc. The same argument might with as much force be made as to a provision of law requiring the publication of an ordinance before its taking effect, or as to any requirement in connection therewith involving expense, however small. Surely a method adopted for the passage of ordinances cannot be declared unconstitutional upon any such ground. It is to be presumed that the municipality will provide the funds necessary for the administration of its government. If there be any offender against the rule invoked by petitioner in this connection, it is the constitutional provision cited by him.

The contention is made that the initiative amendment is in violation of section 13 of article XI of the constitution, which is as follows: "The legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, super-

vise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever."

So far, at least, as the prohibition concerning the delegation by the legislature to any "special commission" to perform any municipal function is concerned, it is clear that the whole object of the provision was to prevent the state legislature from interfering with local governments by the appointment of its own special commissions for the control of purely local matters. It was said in *People v. Hoge*, 55 Cal. 612, 618, that it was the manifest intent of this and other sections "to emancipate municipal governments from the authority and control formerly exercised over them by the legislature." (See 2 Debates and Proceedings Constitutional Convention, p. 1066.) Certainly there is nothing in the language used which could be held to prohibit provision in the organic act framed for the government of a city for such commissions, special or otherwise, to be appointed or elected by the city as might be deemed necessary for the proper conduct of municipal affairs.

Under no circumstances, however, could the aggregate body of qualified electors of a municipality be held to be a "special commission" within the meaning of the constitutional provision. Any claim to the contrary appears so frivolous as not to merit discussion. Nor is there anything in the claim that the electors signing the petition for the submission of a proposed ordinance to the vote of the electors either constitute a "special commission" or perform any "municipal function." Certainly they perform no act of legislation. Whatever "municipal function" is performed in the matter of the adoption of an ordinance under the initiative is performed either by the council, when it enacts the ordinance without submitting it to the electors, or by the electors, when it is submitted by the council. As in *People v. Ontario*, 145 Cal. 625, [84 Pac. 205, 207], the petition of the electors is merely an initiatory step, accomplishing no more than to compel a consideration of a proposed matter by those qualified to act and perform municipal functions, and does not itself constitute the performance of a "municipal function" in any proper sense of those words.

Aside from the prohibition as to "special commissions" contained in this section of the constitution, the utmost effect of the section is to prohibit the granting to private agencies, as distinguished from public agencies, the power to control in any degree the property or improvement work of a local subdivision or municipality, or to levy local taxes or assessments, or to perform any municipal function. Assuming the applicability of this provision to a freeholders' charter, as it is claimed was held in *Yarnell v. Los Angeles*, 87 Cal. 603, [25 Pac. 767], it is manifest that the electors of a municipality, in their capacity as such, do not constitute any such prohibited private agency.

It is earnestly urged that the initiative provision of the charter is inconsistent with the form of municipal government prescribed by title III of part IV of the Political Code (sec. 4354 et seq.). These sections constituted part of the original code, and provided a general form of government for cities. By section 4355, the legislative power of the city was vested in a common council. It is said that this is a general law with which the provisions of the freeholders' charter must be consistent. As to municipal affairs, it is sufficient if the provisions of a charter are consistent with the constitution. As we have shown, the method of exercising the legislative power of a municipality is a municipal affair. But were it otherwise, this provision of the Political Code could not be held to constitute one of the general laws with which charter provisions must be consistent. The old Political Code sections invoked were intended merely as a plan under which cities might be organized and governed, if so desired, and this was the sole object of their enactment. (*Ex parte Simpson*, 47 Cal. 127.) Except where specially made part of a city's charter by reference (*Ex parte Mauch*, 134 Cal. 501, [66 Pac. 183]; *Buck v. Eureka*, 109 Cal. 504, [42 Pac. 243]), they have not been held applicable. The sections of the title relative to refunding a bonded indebtedness, held applicable to Los Angeles in *Los Angeles v. Teed*, 112 Cal. 319, [44 Pac. 580], were part of a much more recent act of the legislature, intended, as this court held, to have general application. The old sections of the Political Code as to the form of government of cities stand, then, in precisely the same class of laws as does the Municipal Corporation Act

of 1883, under which towns or cities may now organize at their option. The constitutional grant to a city to frame its own charter, which, when ratified and approved, shall become its organic law, necessarily assumes that the form of government to be provided therein need not be the same as that provided by the legislature for municipalities generally, and it was for the very purpose of enabling cities to have such a local organization as their local needs demanded, that the authority to frame a charter for its own government was given to every city of over three thousand five hundred inhabitants. That such a charter was not subject to the Municipal Corporation Act even prior to the "municipal affairs" amendment of 1896, is too plain for discussion; but if authority be needed, it is to be found in *People v. Bagley*, 85 Cal. 343, [24 Pac. 716].

Much stress is placed by petitioner upon the fact that in section 8 of article XI of the constitution the words "legislative authority" are used in designating the ordinary legislative body of the city. The use of these words is taken as indicating the intent of the constitution that no legislative power could be exercised except by some representative body such as a council, etc., which should have supreme authority as to all matters of legislative nature. We see no force in this contention. It was doubtless recognized by the framers of the constitution, as it must be by every one, that in the conduct of municipal affairs, it would be impracticable to do without the presence of a local legislative body of some kind, which should possess such powers in that behalf as might be granted to it, and that such a body would exist in every municipality. The words "legislative authority" as here used have no greater significance than such words as "common council or other legislative body" would have had. They were simply intended to designate the particular body which it was recognized would exist under some name or other in every municipality as the proper official agency to submit propositions for amendments to charters, and were not intended to define the powers of that body, or place it in a position where it would be beyond restrictions by the organic act of the city. Doubtless it is this body that is termed the "governing body" in section 1 of article XIV of the constitution, relative to the fixing of water rates, and it may be

that it is the "corporate authority" referred to in section 12 of article XI of the constitution, relative to the assessment and collection of local taxes. (*Board of Education v. Board of Trustees*, 129 Cal. 599, [62 Pac. 173].) But the use of these various terms in various constitutional provisions means no more than that the official body thereby referred to is to have the power or perform the duty specified.

That the electors of a duly organized local subdivision of this state may be authorized to directly participate in the exercise of the legislative power of such subdivision cannot, we think, be seriously disputed. There is certainly no provision of our constitution which expressly or by reasonable inference prohibits it. There is no decision of this court which holds that it is forbidden. What was said in the majority opinion in *Ex parte Wall*, 48 Cal. 279, 321, [17 Am. Rep. 425], upon this point, was pure *dictum*. This was expressly pointed out by the later cases of *People v. Nally*, 49 Cal. 478, 480, and *People v. McFadden*, 81 Cal. 489, [22 Pac. 851], in the latter of which cases it was stated that the real question in *Ex parte Wall* was "whether the legislature could authorize the people of a given locality to suspend the operation, within such locality, of a general penal statute of the state." (81 Cal. 493, [22 Pac. 852].) In the case of *People v. Ontario*, 148 Cal. 625, [84 Pac. 205], which is the latest case bearing on the question, it was held that the power to perform the legislative act of prescribing the boundaries of territory to be annexed to a municipality, which power, under our constitution, could not be performed by the legislature itself, but must by it be reposed elsewhere, could be given by the legislature to the electors of the locality to be affected. We there said: "There is no constitutional provision that intimates that this power can be conferred only on some legislative body, and not upon the electors of the locality to be affected, and, in the absence of such a provision, the question as to whether it shall be given to the one or the other is purely one of policy, upon which the determination of the legislature is conclusive." This appears to be the general rule as to legislative power which a legislature is authorized to grant for local purposes to local subdivisions, and is expressly recognized by some of the cases cited by petitioner. For instance, in *Clarke v. City of Rochester*, 28 N. Y. 605, 634, it is said: "But

while general statutes must be enacted by the legislature, it is plain the power to make local regulations, having the force of law in limited localities, may be committed to other bodies representing the people in their local divisions, or to the people of those districts themselves. Our whole system of local government in cities, villages, counties, and towns depends upon that distinction." (See, also, *People v. Reynolds*, 5 Gilm. (Ill.) 1, approvingly quoted in *Upham v. Supervisors*, 8 Cal. 383.) In the recent case of *Hindman v. Boyd* (Wash.), 84 Pac. 609, 612, the supreme court of Washington upheld the right of the people of the city of Spokane to reserve to themselves, in their charter, the power to compel the submission to the electors of every proposed ordinance granting certain kinds of franchises, such submission to be had whenever a certain percentage of the electors petitioned therefor. It was conceded that the granting of a franchise was a legislative act. The court said: "It is clear, therefore, that the powers of the mayor and council are such as are granted by the charter. If the people choose to provide in their charter that the power to grant franchises of a given character shall not be given wholly to the mayor and council, but shall be reserved to themselves, can it be said that the granting thereof is such a legislative act as cannot be exercised by the people themselves? The power to make a charter is in a sense a legislative one. It is well known that charters so made often contain much that is legislative in its nature, such as the adoption of a complete scheme for making special assessments and other similar elaborate and detailed provisions." We know of no state in which the right of the legislature to grant to the people of a local subdivision the power to directly discharge legislative functions in local matters is denied, except where the constitution of such state may reasonably be construed as forbidding such a grant, as may be held to have been the case in *Shumway v. Bennett*, 29 Mich. 451, [18 Am. Rep. 107], a case relied on by petitioner. Our own constitution certainly cannot be so construed. We entirely concur in what was said by the chief justice in *Ex parte Anderson*, 134 Cal. 69, 75, [86 Am. St. Rep. 236, 66 Pac. 194], where, speaking of the constitutional grant to every county, city, etc., embraced in section 11 of article XI, he said: "This grant to the counties of the power of local legislation is, of course, a

grant to the people of the respective counties. How they are to exercise the power, whether in their primary capacity by voting at the polls, as in the case of the adoption of a state constitution or of amendments thereto, or by their chosen representatives in boards of supervisors, is purely a matter of legislative regulation, and I cannot see how it is possible, upon any recognized principle of constitutional construction, to deny to the legislature the power to confer upon the qualified voters of the respective counties the right to make local laws which will be valid and effective within their territorial limits." This question, as already stated, was not determined by the majority of the court in that case.

If the legislature in providing by general statute for the organization and government of municipalities, can grant such power to the people thereof, there can of course be no question that such power may be vested in the people of a city by the provisions of a freeholders' charter framed by the city, ratified by the electors thereof, and approved by the legislature, under section 8 of article XI of the constitution.

Much that is said in the briefs of counsel assailing the initiative amendment, goes rather to the question of the policy of investing the electors of a municipality with such general power of local legislation than to the question of the validity of the law accomplishing this result. There may reasonably be differences of opinion as to whether the method devised will prove beneficial or not. However, the extent to which the electors of a municipality shall be permitted to directly discharge legislative functions in local affairs is purely a question of policy with which the courts have nothing to do. It is our duty to uphold the charter provision, if it be consistent with our federal and state constitutions, and that it is we have no doubt.

The initiative amendment was one of thirteen amendments to the Los Angeles charter ratified by the electors of Los Angeles at a general municipal election. They were approved by the legislature as a whole by a single concurrent resolution, the title to which simply stated that it was a resolution "approving thirteen certain amendments to the charter of Los Angeles," etc. There is nothing in the point made by *amici curiæ* that this was a violation of the requirement that every act shall embrace but one subject, which subject shall be

expressed in its title. The method pursued was strictly in accord with the provisions of section 8 of article XI of the constitution, relative to the approval of charters and amendments thereto, as we read the same.

The writ is discharged and the petitioner remanded.

Shaw, J., Sloss, J., Lorigan, J., Henshaw, J., and Beatty, C. J., concurred.

McFARLAND, J., dissenting.—I dissent; but I will not undertake to do more just now than to briefly outline the skeleton of the argument which leads me to the conclusion that the "initiative" as contained in the Los Angeles charter is unconstitutional and void.

I will not stop to discuss the forcible contention by counsel for the petitioner that the provision of the charter under consideration is violative of certain parts of our state constitution, because, in my opinion, the provision is violative of that part of the constitution of the United States which declares that "Congress shall guarantee in each state a republican form of government." It is, in my judgment, a narrow and incorrect view of that provision of the United States constitution to hold that it concerns Congress alone, and that a state may violate it at its will so long as Congress does not choose to interfere. The provision declares a great constitutional principle, and must be observed by all coming within its purview. The correct construction, is that given by the United States supreme court in *Minor v. Happersett*, 21 Wall. 162, where it is said: "The guarantee necessarily imposes a duty on the part of the states themselves to provide such a government." Therefore every act done by a state which is inconsistent with and violative of the theory of a republican form of government is invalid.

Now, what is a republican form of government? These words are not defined in the constitution itself; like other words used in that instrument, we must look for their meaning to the general and usual sources and authorities which determine the signification of English words and phrases. And an examination of those sources leaves no doubt as to the meaning of the phrase in question. It is defined in the Federalist, in legislative debates, in judicial opinions, in text-

books of the law, and in the standard dictionaries of the language. I shall not quote from these authorities. The meaning of the phrase as derived from these sources is correctly and concisely stated in Webster's dictionary as follows: "A state in which the sovereign power resides in the whole body of the people, and *is exercised by representatives selected by them.*" A republican form of government is one in which the people select those who are to make their laws, and is radically different from a pure democracy, in which the people collectively and as their own original act make the laws. And whenever under our American system of representative government a state undertakes to destroy the representative system and install in its place, as the lawmaking power, the people, either acting in a mass-meeting, or enacting laws by ballot, in their original capacity, it undertakes to do an unconstitutional thing which is void. And it is to be observed that the initiative provision of the Los Angeles charter is not confined to merely reserving to the people the right to approve of measures which refer to one or two special subjects; it gives them full affirmative sway over the whole matter of municipal legislation—they may propose and pass by vote "any ordinance."

It is said that although the state might not have power to take the lawmaking power of the state from a representative body and confer it upon the whole people, still it may do so as to part of the state organized as a municipality. But what the state cannot do itself it cannot authorize a municipality to do; the act is one which the state cannot do at all, and therefore cannot make such act valid in any part of its territory. Moreover, the state cannot do indirectly that which it cannot do directly; and considering the wide power of legislation which the people of the state have already given the municipalities, the latter are exercising lawmaking power almost equal to that of the state; the initiative in the Los Angeles charter embraces a large power of general legislation which usually belongs to the state. Already a municipality is independent of the state as to all legislation relating to municipal affairs; and we all know how difficult it is to determine how far legislation as to "municipal affairs" runs into general legislation. Moreover, considering the generosity with which the people of the state have given away their

powers to municipalities, there is no telling how much further they may go in that direction. If this disposition continues, the time may come when California will be not much more than a shadow of a name—used to designate the territory within which exists certain almost free cities and independent municipalities. Why should the people of the state, with their present love of municipal power, restrict the legislative power of a municipality to “municipal affairs”; why should not each municipality have its own substantive law in all ordinary matters of legislation—no matter what the law on any subject might be in other municipalities, or in other parts of the state. And the initiative would then cover substantially all the legislation in the state.

Of course, the expediency or wisdom of the law under consideration is not a judicial question; but it is well to remember that in a government republican in form representative legislators are persons who are presumed to have, at least, some special qualifications for legislative work, they are chosen some time before they are called to act, they meet and consult with each other, they are not too much hurried in their action, and take full time for consideration of proposed legislation. In a pure democracy, which is represented in part by the initiative, whenever demagogues, pseudo-reformers, or promoters of discontent are able to “fool” the people for only a short “part of the time” by a mischievous proposition, they can by a hurried special election have the proposition voted into a law before there is an opportunity for a sober second thought. It admits the very evils which the representative form of government was intended to guard against.

I cannot refrain from expressing regret at the apparent readiness of many of the people of this state to abandon prominent features of our American system of government—the wisest and best system ever yet devised and put into successful operation.

[Sac. No. 1258. Department One.—Nov. 8, 1906.]

F. A. DODGE, and J. E. RICHMOND, Copartners, etc.,
Appellants, v. KINGS COUNTY, Respondent.

COUNTY ADVERTISING—DELINQUENT TAX-LIST—PRICE FIXED BY SUPERVISORS—DISCRIMINATION—MOTIVES.—Under subdivision 21 of section 25 of the County Government Act of 1897 the tax-collector has authority to procure the advertising of the delinquent tax-list at a price no greater than that annually fixed by the supervisors; and the validity of the action of the supervisors in fixing a less price per square for printing the delinquent list than for other county advertising, cannot depend upon the motives of its members to discriminate against plaintiffs' newspaper.

ID. — REASONABLENESS OF DISCRIMINATION — SUPPORT OF FINDING.—Where the court found upon sufficient evidence that there was good reason for excepting the publishing of the delinquent list from the general rates fixed for the other county advertising, and that the distinction made was not arbitrary or unnatural, its finding cannot be disturbed, and the judgment and order based thereupon will be affirmed.

APPEAL from a judgment of the Superior Court of Kings County. M. L. Short, Judge.

The facts are stated in the opinion of the court.

E. T. Cosper, for Appellants.

H. Scott Jacobs, District Attorney, for Respondent.

SLOSS, J.—Appeal by plaintiffs from a judgment and an order denying a motion for new trial.

The action was brought by the appellants, printers and publishers of the Hanford Sentinel, a newspaper, to recover from Kings County the sum of \$383.75 for printing and publishing the delinquent tax-list of the defendant in June, 1901.

The publication was made by direction of the tax-collector. Under the provisions of subdivision 21 of section 25 of the County Government Act (Stats. 1897, p. 464) the tax-collector had authority to procure such advertising, at a price no greater than that fixed by the board of supervisors, who are required to annually fix the price of all county advertising. (*Journal Pub. Co. v. Whitney*, 97 Cal. 285, [32 Pac. 237].) In January, 1901, the board of supervisors had made an order reading as follows:—

"It is ordered that the following rates be, and they are hereby established for county advertising during the present year, to wit:

"For first insertion, per square, fifty cents. For each subsequent insertion, per square, twenty-five cents. Said rate to apply to all county advertising except the publication of the delinquent tax-list, the rate for which is hereby fixed as follows:

"For four insertions, fifteen cents per square."

The court gave the plaintiffs judgment for \$46.05, which was the amount due at the rate of fifteen cents per square for four insertions, as fixed by the order of the board of supervisors. The claim of the plaintiffs, however, is that the order of the board, in so far as it purported to fix a less rate for publishing the delinquent tax-list than for other county advertising, was void. The complaint alleges that the rates fixed for general county advertising are reasonable and just; that the work of printing the delinquent tax-list is of the same general character, and that the rate fixed for publishing such delinquent list was so low as to entail a loss on any one publishing it at such rate. The distinction made between the two classes of printing is alleged to be arbitrary and without good reason, and it is charged that the board of supervisors adopted the two different rates for the purpose of discriminating against the plaintiffs. So far as concerns the allegation of an intent to discriminate against the plaintiffs, the finding of the court was against plaintiffs, but even if it had not been, it cannot be contended that the validity of the action of the board of supervisors should be made to depend upon the motives which actuated the members of the board. On the issues raised as to the reasonableness of the distinction between the two classes of printing, the court found that "there was good reason for excepting the publishing of the delinquent tax-list from the general rates fixed for the other county advertising of a like general character; that the distinction so made by said exception was not arbitrary nor unnatural." The appellants contend that these findings are not supported by the evidence. While the bill of exceptions discloses considerable testimony tending to support the view that the cost of doing the work and the reasonable value of the service were the same in each case, there was evidence which we think

supports the findings of the court. One of the plaintiffs' witnesses testified that the printing of the tax-list is "much easier for the compositor than the general run of advertising, because it is descriptive matter and to a certain extent it is table matter and more or less figures." The tax-collector himself testified that he had had a verbal offer to publish the tax-list at the rate fixed by the supervisors. And the testimony of a member of the board was that the supervisors fixed the rate by "learning what it was printed for in other counties and what they offered to print it for here." The court accepted the statements of these witnesses, and, so accepting them, was justified in finding as it did on the facts in issue.

It follows that the judgment and order must be affirmed. We may add that we are not to be understood as holding that a different result could be reached if the evidence had shown conclusively that the rate fixed for publishing the delinquent tax-list *was* arbitrary and unreasonable. The only authority which the law gave to the tax-collector was to procure the advertising at a price no greater than that fixed by the board. It may well be argued that one who does work after a rate has been fixed accepts that rate and is bound by it, or, in any event, that if the order fixing the rate be void, no recovery can be had, since the fixing of a rate is the condition upon which, by the terms of the law, the liability of the county depends. To strike out of the order the rate fixed for publishing the delinquent tax-list could hardly have the effect of making the general rate of fifty cents per square for the first insertion and twenty-five cents for subsequent insertions apply to the delinquent tax-list. By such ruling the court would be making for the board a rate which it never intended to fix. In this respect, as well as in others, the case is very different from *Van Harlingen v. Doyle*, 134 Cal. 53, [66 Pac. 44], which dealt with a void and severable provision of an act of the legislature of the state.

In making these last suggestions, we desire to avoid any inference that might be drawn from a failure to notice the contention as to the effect of an arbitrary and unreasonable fixing of rates, rather than to decide a question which, in the view we take of the evidence, is not here involved.

The judgment and order appealed from are affirmed.

Shaw, J., and Angellotti, J., concurred.

[S. F. No. 3277. In Bank.—November 20, 1906.]

PAULINE COHEN, and GEORGE KNIGHT WHITE, her Assignee, Respondents, v. MEYER COHEN, Appellant.

DIVORCE—JUDGMENT FOR ALIMONY—COLLATERAL ATTACK—DEFECTIVE COMPLAINT—PRAYER FOR GENERAL RELIEF—JURISDICTION.—A judgment for alimony included in a judgment for divorce based upon a complaint stating a cause of action for divorce for extreme cruelty, but containing no averments concerning property or the husband's ability to pay alimony, and containing only a prayer for divorce and for general relief, is not void upon its face nor subject to collateral attack. The defect in the complaint does not go to the jurisdiction to include alimony in the judgment.

ID.—REMEDIES IN SUPERIOR COURT.—The superior court has no power to set aside such judgment for alimony as an act done without jurisdiction. It can be modified therein as in excess of the relief specifically prayed for in case of default only by proceedings under section 473 of the Code of Civil Procedure, or by proceedings in equity.

ID.—APPEAL FROM ORDER MODIFYING AND VACATING PERMANENT ALIMONY—REMARRIAGE OF PLAINTIFF—JURISDICTION NOT REVIEWABLE.—Upon an appeal from an order of the superior court modifying the judgment as to permanent alimony by enforcing it for accrued payments and vacating it from a fixed date, under a motion to vacate and modify it solely on the ground that equity and justice required that it should be vacated because of the remarriage of the plaintiff, the original jurisdiction of the court to render the judgment for alimony is not reviewable.

ID.—RIGHT OF HUSBAND TO VACATE ALIMONY UPON REMARRIAGE OF WIFE—EXCEPTIONS—PRESUMPTIONS.—The divorced husband may, in general, secure an order vacating the decree for permanent alimony upon remarriage of the divorced wife, excepting where it appears to have been awarded in lieu of the wife's rights of property, or where it appears that the second husband is unable to support her. In the absence of any averments of the complaint as to the husband's property and of any showing to the contrary, it must be presumed that the alimony allowance had no other basis than her husband's general obligations of support and maintenance; and in the absence of any showing that the second husband is unable to support her, his ability to do so must be presumed; and where no rights of children are involved, all alimony accruing after the remarriage should be vacated.

ID.—LACHES NOT IMPUTABLE TO HUSBAND—ESTOPPEL OF WIFE.—The delay of the defendant in proceeding for a vacation of the decree for a period less than the statute of limitations does not constitute

laches, where it appears that he had no actual knowledge of the allowance and nothing was said about it in the complaint, and before the decree the wife made a conditional agreement in writing with the husband that she would not ask alimony, and not long after the decree she removed from the state and remarried in another state nine months after the divorce, and gave him no notice that she had obtained such allowance. The wife in such case is estopped to complain of the delay of the husband; and he was not required to proceed to avoid a liability of which he was ignorant.

1D.—ASSIGNMENT OF UNDEMANDED ALIMONY AFTER REMARRIAGE—CAVEAT EMTOR—SUBJECTION TO ATTACK.—A judgment for alimony is not a negotiable instrument; and where it was assigned long after the wife's remarriage, and no part of it had ever been paid or demanded from the husband, it is eminently a case for the application of the maxim *caveat emptor*, and the assignee purchasing the judgment got the right he bought and no more. The judgment is subject to the same attack in his hands as it would have been had it remained in the name of the original plaintiff; and he is not entitled to enforce any unpaid alimony accruing after the plaintiff's remarriage.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. M. C. Sloss, Judge.

The facts are stated in the opinion of the court.

Henry H. Davis, W. R. Daingerfield, and Jerome H. Kann, for Appellant.

H. M. Owens, T. C. West, L. C. Pistolesi, George Knight White, and Henry G. Tardy, for Respondents.

SHAW, J.—Pauline Cohen, on January 4, 1898, obtained a decree of divorce from the defendant, Meyer Cohen, judgment being taken by default for his failure to appear or answer. The decree adjudged that Meyer Cohen should pay to Pauline, as permanent alimony, the sum of ten dollars per month thereafter. On October 4, 1898, Pauline was married to one Hoffman. On December 4, 1901, Pauline duly assigned to George Knight White all money due her under the decree. On December 13, 1901, White obtained an order in the case requiring the defendant to show cause before said superior court on December 20, 1901, why an execution should not issue against him for the money due. The matter was continued to January 17, 1902, and in the mean time the

defendant served notice of a motion to vacate and modify the decree for alimony, upon the ground that since the rendition of the decree the plaintiff had become the wife of Hoffman, and that equity and justice demanded a modification thereof. Both motions were heard together. The court refused to vacate the decree as to the amounts already accrued, but modified it by directing that the payments of alimony thereon should cease after January 15, 1902, and directed that execution be issued for the sums previously accrued, amounting to four hundred and ninety dollars. From this order the defendant appeals.

The complaint alleges a good cause of action for a divorce on the ground of extreme cruelty, but contains no averments concerning property or concerning the husband's ability to pay alimony. The prayer is for a divorce and for "such other relief as may be just and meet in the premises and within the jurisdiction of the court." It is now contended that the judgment for alimony is void on the face of the record, because of the absence of any averments in the complaint of facts showing the husband's faculties, or of any prayer for that particular relief. There are two reasons why this claim cannot be upheld.

In the first place, the defect does not go to the jurisdiction, and hence does not render the judgment void. In *Gaston v. Gaston*, 114 Cal. 545, [55 Am. St. Rep. 86, 46 Pac. 609], this court said: "It is argued that the portion of the judgment requiring the payment of forty-five dollars per month for the support of plaintiff is void because no statement of the husband's ability was contained in the complaint. The provision for support in such cases is ordinarily an incident of the judgment of divorce; the jurisdiction of the court (which is the extent of our concern at present) to make such provision is not dependent upon averments in the complaint of the husband's resources—any more than its power to dispose of the children depends upon an allegation of the relative fitness of the parents for their custody." The following cases are to the same effect: *Sprague v. Sprague*, 73 Minn. 474, [72 Am. St. Rep. 636, 76 N. W. 268]; *McKensy v. McKensy*, 65 N. J. Eq. 633, [55 Atl. 1073]; *Seibly v. Ingham*, 105 Mich. 584, [63 N. W. 528]; *Darrow v. Darrow*, 43 Iowa, 411; 2 Bishop on Marriage, Divorce, and Separation, secs. 1008, 1009.

The judgment is not void on the ground that it gives relief in excess of that specifically prayed for. Section 580 of the Code of Civil Procedure, providing that where there is no answer the relief cannot exceed that demanded in the complaint, does not make the judgment void in a case where the relief given is within the terms of a prayer for general relief and is germane to the cause of action stated, although it may not be authorized by the facts alleged. In such cases the judgment may be erroneous as to the excess and subject to reversal or modification on appeal, but it is not void, nor subject to collateral attack on that ground, nor has the lower court power to amend or modify it as to the excess, as an act done without jurisdiction. It can be modified in the lower court only by proceedings under section 473 of the Code of Civil Procedure, or by proceedings in equity. It has indeed frequently been held that a judgment for more relief than is prayed for is not void as to such excess and cannot be attacked in collateral proceedings, although there is no prayer for general relief. (*Bond v. Pacheco*, 30 Cal. 530; *Chase v. Christianson*, 41 Cal. 253; *Mach v. Blanchard*, 15 S. Dak. 439, [91 Am. St. Rep. 698, 90 N. W. 1042]; *Harrison v. Trust Co.*, 144 N. Y. 326, [39 N. E. 353]; *Ketcham v. White*, 72 Iowa, 193, [33 N. W. 627]; *Jones v. Jones*, 78 Wis. 446, [47 N. W. 728].)

Secondly, the defendant did not move the court below to vacate this part of the judgment on the ground that it was void, but upon the ground that equity and justice required that it should be vacated because of the remarriage of the plaintiff, and the court below having refused to set it aside, this court cannot on appeal from the order denying that motion go beyond the matter appealed from and vacate the judgment on a ground not presented to the court below nor involved in the appeal,—namely, that the judgment is void for want of jurisdiction. It is not an appeal from the judgment, and this court cannot on the appeal from the order in question inquire into the jurisdiction to render the judgment.

Upon the merits of the motion it is insisted that upon the showing made the court should have modified the judgment by an order releasing the defendant from any obligation to pay the sums accruing after the plaintiff's marriage to Hoffman. In this we think counsel is correct.

The code expressly gives the court power to modify from time to time its orders respecting permanent alimony. (Civ. Code, sec. 139.) The judgment, in the first instance, might have been made for a gross sum, or for periodical payments, either for a stated period, or, as in effect was done, during the life of the plaintiff. (Civ. Code, sec. 139.) To change this judgment so as to require the payments for a stated period only, would not be an annulment of the original judgment, but only a modification thereof. Therefore, such modification would be within the power of the court, even if it were conceded that the power to modify did not give authority to vacate such order in its entirety. "Where a wife has obtained an absolute divorce carrying with it the privilege of a remarriage, and permanent alimony is decreed to her, it is generally held that the husband, upon her subsequent remarriage, may secure an order vacating the decree as to alimony." (14 Cyc. 787, citing *Casteel v. Casteel*, 38 Ark. 477; *Brown v. Brown*, 38 Ark. 324; *Bowman v. Worthington*, 24 Ark. 522; *Stillman v. Stillman*, 99 Ill. 196, [39 Am. Rep. 21]; *Southworth v. Treadwell*, 168 Mass. 511, [47 N. E. 93]; *Albee v. Wyman*, 10 Gray, 222; *Bankston v. Bankston*, 27 Miss. 692; *Olney v. Watts*, 43 Ohio St. 499, [3 N. E. 354]; *Brandt v. Brandt*, 40 Or. 477, [67 Pac. 508].) There is a qualification of this rule, generally adverted to in the cases cited, to the effect that such a remarriage does not authorize a vacation of the decree for alimony, where it is given as a substitute for, or in lieu of, the wife's rights, at the time of the decree, in the property of the husband, or in the community property, or in property which he acquired from her by the marriage. This qualification does not affect this case, however, for there is no claim here that the allowance in question was based upon either of those grounds. In view of the absence of any allegations in the complaint as to his property and of any showing to the contrary on the hearing of the motion, it must be presumed that the allowance had no other foundation than the obligation to give her support and maintenance, which was a part of his marriage covenant, and that it was not based upon any property rights possessed by her at the time of the divorce.

In support of the defendant's motion it was shown that the remarriage took place in Seattle, Washington, on October

4, 1898; that after the filing of the complaint for divorce, and prior to the decree, the plaintiff, in writing, promised the defendant that she would not ask alimony in the action; that the defendant had no actual knowledge of the allowance of alimony in the judgment until December 1, 1901; that he thereupon began proceedings upon the motion to vacate that portion of the judgment; and that no part of the allowance had ever been paid. No evidence was introduced by either party concerning the ability of the second husband to support the plaintiff. It was held in *Southworth v. Treadwell*, 168 Mass. 511, [47 N. E. 93], that the fact of remarriage gave the wife the right to claim support from another man and throws upon her the burden of proving that such support is not adequate to her needs, and is *prima facie* sufficient cause to revise the judgment for alimony. We think this rule is just and equitable. The presumption would be that the second husband was able to fulfill his marriage covenant and support his wife according to her station in life. This is the ordinary and normal condition of married persons, and such ordinary condition is to be presumed until the contrary is shown. (Code Civ. Proc., sec. 1963.) If in fact the second husband was unable to give his wife reasonable support, the wife would be better advised of the facts than the former husband, and justice would require that proof of such inability should be produced by her. It is to be gathered from the decisions in *In re Spencer*, 82 Cal. 110, [23 Pac. 37], and *Ex parte Spencer*, 83 Cal. 460, [17 Am. St. Rep. 266, 23 Pac. 395], that this court there held that the remarriage of a wife does not of itself avoid a previous decree for alimony. But we believe that the cases wherein the alimony should be continued after the remarriage are extremely rare and exceptional, particularly where there are no children of the former marriage. Good public policy would not compel a divorced husband to support his former wife after she has become another man's wife, except under extraordinary conditions, which she should be required to prove. Unless such conditions are shown by her to exist, the court should, on the former husband's motion, cancel all payments accruing after the remarriage, in all cases where, as here, there are no children and the allowance is based solely upon the husband's probable earning capacity, or upon his breach of the marriage vows, and not upon existing property rights.

The delay of the defendant in proceeding for a vacation of the allowance does not under the existing circumstances constitute laches. Delay for a time less than the period of limitation does not amount to laches, unless it occasions, or may be presumed to occasion, wrong or prejudice to the other party, an element entirely lacking here. (*Cahill v. Superior Court*, 145 Cal. 46, [78 Pac. 467].) He had no actual knowledge of the allowance. She did not in her complaint allege his abilities, or pray specifically for an allowance. Before the decree she made a conditional agreement with him that she would not ask alimony. Not long after the decree she removed to the state of Washington, and was there remarried nine months after the divorce, and she never at any time before the assignment demanded any payment on account of the alimony allowed, or gave him any notice that she had obtained such allowance. She is certainly in no position to complain of the delay, and he was not called upon to proceed to avoid a liability which he had reason to believe did not exist and of which he was in fact unaware.

The defendant did not assign the judgment to the respondent White until December 4, 1901. The bill of exceptions recites that evidence was given that "the assignment was for a valuable consideration," but the price is not otherwise stated. It is, however, immaterial. The contention that the assignee, White, is an innocent purchaser for value, and that therefore the decree for alimony already accrued cannot be modified as against him, cannot prevail. The judgment is not a negotiable instrument. No part of it had ever been paid, nor, so far as appears, had any demand ever been made for it. If an obligation could be dishonored by failure to comply with it, then certainly this obligation was so dishonored. It is eminently a case of the application of the maxim *caveat emptor*. The purchaser got the right he bought and no more, and the decree is subject to the same attack in his hands as it would have been had it remained in the name of the original plaintiff.

The order appealed from is reversed and the cause remanded for further proceedings in accordance with this opinion.

Angellotti, J., Henshaw, J., McFarland, J., and Beatty, C. J., concurred.

[S. F. No. 3453. Department Two.—December 3, 1906.]

PEOPLE'S HOME SAVINGS BANK, Appellant, v. ANNA
STADTMULLER, Respondent.

CORPORATIONS—SUBSCRIPTIONS TO STOCK—LIABILITY LIMITED TO REGISTERED OWNER.—The registered owner of the stock of a corporation is alone liable to the corporation for assessments or calls for payment of subscription, until a transferee thereof causes the transfer to be entered upon the books of the corporation or deals with the corporation as a substituted stockholder and is accepted by the corporation as such.

ID.—ACTION BY INSOLVENT BANK—CALLS FOR UNPAID SUBSCRIPTIONS—DISTRIBUTEES OF STOCK NOT LIABLE.—An action by an insolvent savings bank, which has called in all unpaid subscriptions to its stock, cannot be maintained against a distributee of stock whose name is not upon its books and who has done no act to establish privity with the corporation, it appearing that the stock still stands upon the books in the name of the decedent personally.

ID.—PLEADING—OWNERSHIP OF STOCK—CONCLUSION—UNCERTAINTY.—An averment by plaintiff that defendant became and is the owner and holder of the stock, which is a mere conclusion from the facts specifically alleged as to the distribution of the stock to her, and that she "accepted" the certificate and retained the same, does not, as against a general demurrer and a special demurrer for uncertainty and ambiguity, show that defendant made herself liable for the unpaid portion of the subscription made by the decedent. [Per Beatty, C. J., on petition for rehearing.]

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

F. S. Stratton, and Stratton & Kaufman, for Appellant.

T. C. Coogan, for Respondent.

HENSHAW, J.—This is an appeal from a judgment given after demurrer sustained to the fourth amended complaint of plaintiff. The complaint charged that one F. D. Stadtmuller subscribed for and received from plaintiff one hundred shares of its capital stock, of the par value of one

hundred dollars each, and that he continued to be the owner of this stock until the defendant in turn became the owner thereof; that Stadtmuller had paid in thirty-three and one-third dollars per share upon his stock, and was liable to the plaintiff for the sum of sixty-six and two-thirds dollars on each share whenever such unpaid portion should be called in and demand made therefor. The death of Stadtmuller and the proceedings in the administration of his estate are set forth, and it is averred that by these proceedings "the said one hundred shares of the capital stock of the plaintiff were duly distributed unto the said defendant. . . . And that said defendant accepted said certificate, and ever since has and still and now does retain the same. Plaintiff alleges that ever since said 28th day of December, 1894, the defendant has been and still and now is the owner and holder of said hundred shares of said plaintiff's capital stock." It is then alleged that twelve days after the distribution to defendant—upon January 12, 1895—plaintiff became insolvent, and ever since that date has been insolvent, and that on the thirtieth day of September, 1895, "and after said defendant had accepted and received and became the owner of said certificate and said shares represented thereby as aforesaid," plaintiff duly called in all of its unpaid capital stock. Defendant has refused to pay sixty-six and two-thirds dollars on each of the shares so held by her, and judgment is prayed against her for that amount. It is admitted that no claim was ever presented against the estate of F. D. Stadtmuller upon this contingent liability, and it is also admitted that this defendant did not cause the stock to be transferred to her name upon the books of the corporation, nor do any act equivalent thereto, and that she does not appear as a stockholder upon the books of the company. It is contended, however, by the appellant, that the acceptance, as owner, of the stock under the circumstances alleged in the complaint is sufficient to establish a privity between herself and the corporation so that she becomes a stockholder thereof subject to all the rights, duties, and liabilities of such stockholder.

Respondent, in support of the judgment, contends that as no claim was presented upon this contingent liability against the estate of Stadtmuller, this liability was barred forever (Code Civ. Proc., secs. 1493, 1500; *Verdier v. Roach*, 96 Cal.

467, [31 Pac. 554]), and that the distributee thus took the stock with the right of the corporation to call in the unpaid purchase price, likewise barred forever. Otherwise, it must be said that by force of the decree of distribution, which does no more than to designate the persons to whom the title of the estate belongs, and to stand for all the world as a muniment of such title, a liability was created against the distributee which had been forever barred against the estate.

Interesting as a consideration of this question would prove, its determination becomes unnecessary, because the second proposition which respondent urges and argues is conclusive in favor of the judgment. That proposition is that upon the face of the complaint the defendant is not a stockholder within the meaning of the law which renders a stockholder liable for the unpaid balance of the subscription price of stock.

Section 324 of the Civil Code, with other matters, declares that shares of stock, except as hereinafter provided, are personal property and may be transferred by indorsement by the signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate, but such transfer is not valid except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties, by whom and to whom transferred, the number of certificate, the number or designation of the shares, and the date of transfer. In *People v. Robinson*, 64 Cal. 373, [1 Pac. 156], this court, in construing the statute of 1853, which was identical as to the language under consideration with that of section 324 of the Civil Code, declared that this clause meant that a transfer of stock, until entered upon the books of the company, conferred on the transferee no rights as between himself and the company, no rights beyond that of having such transfer properly entered, and that whatever right the purchaser of a certificate of stock might acquire as between himself and his vendor "it is well settled that, as between himself and the corporation, he acquires only an equitable title, and until he secures a transfer on the books of the company he is not a stockholder, and has no claim to act as such." As to a corporation organized under the code provision as it now stands, this court said in *Visalia Railroad Co. v. Hyde*, 110 Cal. 632, [52 Am. St. Rep. 136, 43 Pac. 10]: "For the purpose of ascertaining those who are

liable to it for the amount of the assessment, the corporation can look only to the list of stockholders as their names are registered upon its books." And, indeed, the rule is universal in states whose laws contain a provision such as that of ours embodied in section 324 of the Civil Code, that the registered owner of stock is alone liable to the corporation until the transferee causes the transfer to be entered upon the books of the corporation, or in some other way equivalent in the eye of the law, establishes the relationship of stockholder between himself and the company, and is thus accepted by the company as a substituted stockholder for the original holder. It is true, of course, that as between the transferor and the transferee, the transferor, who has been made to pay a call or an assessment upon the stock, has a right of recovery over against his transferee. But the corporation must proceed against the transferor, because he stands upon its books as a stockholder, and has no right of action against the transferee, because, as between him and the corporation, the contractual relation of stockholder has not been created. Thus says Cook on Corporations (4th ed., sec. 258): "Until a transfer is recorded in the transfer-book of the corporation, the transferee, not being duly recognized as a stockholder, is not chargeable either with corporate debts or unpaid balances of the subscription. He is bound to protect and indemnify his transferor, but he is not liable to the corporation or corporate creditors or other stockholders." (See, also, Clark & Marshall on Private Corporations, sec. 588; Beach on Private Corporations, sec. 130; *Bates v. Babcock*, 95 Cal. 479, [29 Am. St. Rep. 133, 30 Pac. 605].) Of course, the cases are numerous which hold that the provisions in the by-laws of a corporation as to the forms and procedure for effecting a transfer are provisions for the benefit of the corporation, so that errors or irregularities in complying with such forms and procedures will not avail a person in his attempt to deny his stockholder's liability. Likewise the cases are numerous where a party has been refused a hearing in his denial that he was a stockholder upon the familiar grounds of equitable estoppel, as where he has accepted and receipted for dividends, has voted at stockholders' meetings, or in various other ways has exercised a stockholder's privileges. None of these cases, however, goes to the proposition that where the law requires a transfer of stock before the relationship of corporation and

stockholder exists, that such relationship may be forced on one who has done no act to establish such privity. The mere fact that the distributee or legatee of an estate takes the paper certificate, and does nothing more, cannot be said to be a substantial compliance with the provisions of section 324 of our Civil Code. For, if so, those provisions are absolutely meaningless and every unrecorded transfer of stock establishes against the transferee the relation of stockholder.

Of course, the right of the corporation to proceed and sell the stock in case of delinquency is an entirely separate and distinct right, and one not here under consideration. This action deals entirely with the personal liability of the defendant because of her ownership of the stock under the circumstances above set forth. As to this we have seen that no such liability exists, and the judgment appealed from is therefore affirmed.

McFarland, J., and Lorigan, J., concurred.

A rehearing in Bank was denied December 28, 1906, upon which the following opinion was rendered by Beatty, C. J.:—

BEATTY, C. J.—Counsel for appellant in their petition for rehearing urge very strongly the argument that as the complaint contains an allegation “that ever since the 28th of December, 1894, the defendant became and now is the owner and holder of said 100 shares of said plaintiff’s capital stock,” the fact so alleged is confessed by the demurrer, and therefore establishes defendant’s liability. But this allegation is merely a conclusion of the pleader from the facts specifically alleged,—viz. that the stock was distributed to the defendant (sixteen days prior to the confessed insolvency of the plaintiff), and that she “accepted” it. It is like an allegation of ownership of the demanded premises in ejectment coupled with an attempted deraignment of title which shows that the title is defective. Here the demurrer is special on the ground of uncertainty and ambiguity, in that it cannot be determined what is meant by “accepted,”—which may mean no more than that the defendant received the certificate of stock from the executor and retained it in her possession. In such a case I am satisfied she did not make herself personally liable for the unpaid portion of the subscription price of stock.

[S. F. No. 3641. Department One.—December 14, 1906.]

**KIMBALL I. HATCH and EMMA F. HATCH, Appellants,
v. McCLOUD RIVER LUMBER COMPANY, Respondent.**

NEGLIGENCE—INJURY FROM WIRE ROPE—OBVIOUS DANGER—ASSUMPTION OF RISK BY TENANT—LANDLORD NOT RESPONSIBLE.—Where premises were leased with full knowledge by the tenant, and without warranty by the landlord, concerning an obvious danger from a wire rope imbedded in the earth on the lot, which supported a telegraph-pole forming part of the landlord's electric system, which rope was not part of the leased premises, and where the tenant had lived thereon sixteen months before injury resulted to the tenant's wife from a fall upon the rope, the tenant and his wife had assumed all risk from such obvious danger; and no actionable negligence is imputable to the landlord in maintaining the wire rope, nor is he responsible for such resulting injury.

ID.—LATENT DANGER FROM SHARP POINTS—CONTRIBUTORY NEGLIGENCE.—Conceding, without deciding, that the landlord was guilty of negligence in allowing sharp points of wire near the ground at the end of the wire rope to remain without protection or guard, where it appears that the wife's fall upon the wire and her resulting injury upon the sharp points were the consequence of her own contributory negligence in coming in contact with the exposed wire, the case is one where her contributory negligence in part caused her injury, and there can be no recovery for any negligence of the defendant contributing thereto.

ID.—INSUFFICIENT PLEADING—INCONSISTENT AVERMENT OF CARE.—The complaint by the tenant and his wife against the landlord, which alleges facts negating the actionable negligence of the landlord in maintaining the wire rope and facts showing her own contributory negligence, is insufficient; and it is not sustainable by reason of an allegation that she was using all due care to avoid the wire, which is incompatible with the averment of her familiarity with its position and with the absence of any averment of extraordinary circumstances making it necessary for her to come in contact with it.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Edward C. Harrison, for Appellants.

F. D. Madison, for Respondent.

SHAW, J.—This is an action to recover damages to the plaintiff Emma F. Hatch, wife of the plaintiff Kimball I. Hatch, arising from an injury alleged to have been caused by the negligence of the defendant. A demurrer to the complaint was sustained in the court below, and judgment rendered accordingly. The sole question presented by this appeal is the sufficiency of the complaint.

On May 29, 1900, the defendant let to the plaintiff Kimball I. Hatch a dwelling-house and the lot on which it stood. The plaintiffs immediately took possession and remained in the occupancy of the premises until the injury occurred, which was on October 7, 1901. At the time the house was leased an electric-light pole was standing in the street, on the sidewalk, in front of the lot. From the top of this pole a stay-wire or rope extended to the ground, within the lot so leased, at a point two and a half feet inside of the front line thereof, where it was fastened to an anchor fixed in the earth. This wire inclined at an angle of forty-five degrees from the top of the pole to the ground, and crossed the front line of the lot about two and a half feet above the surface of the ground. The plaintiffs knew of the existence and position of this wire at the time of the lease. It was of course plainly visible in the daytime. The pole and wire belonged to the defendant, constituted no part of the leased premises, and was under the control of the defendant as a part of an electric-lighting system maintained by it in the town where the premises were situated. At the point where the wire was fastened to the anchor, and a few inches above the ground, several sharp points or ends of wire protruded, which were dangerous to any person who might come in contact with them. They were so small and so near the ground that they were not easily discernible.

On the seventh day of October, 1901, between seven and eight o'clock in the evening, the plaintiff Emma F. Hatch, while leaving the premises, came in contact with the wire rope, was thereby tripped and caused to stumble and fall over the same, and in so doing struck the protruding points aforesaid, and was thereby injured severely. She was not aware of the existence of said points until she came in contact with them, but she knew of the wire, and it is alleged that at the time she was "using all due care to avoid the same."

Under these circumstances we are of the opinion that no actionable negligence on the part of the defendant is shown. So far as the wire rope is concerned, as distinguished from the small ends near the ground, the defendant was under no duty whatever to advise the plaintiffs regarding the danger therefrom, or to guard them from coming in contact therewith. The rope was on the premises at the time the lease was made, and the plaintiffs lived in the house for sixteen months thereafter before the injury occurred, and they must have become extremely familiar with its location and appearance. The premises were let to the plaintiffs without guaranty or warranty in regard to this rope. Under such circumstances, the tenant in taking the premises assumes all risk arising from dangers which are obvious to ordinary observation. (*Gately v. Campbell*, 124 Cal. 520, [57 Pac. 567]; *Brewster v. de Fremery*, 33 Cal. 341.)

With regard to the sharp points or ends near the ground, it is apparent from the facts stated in the complaint that whatever injury the plaintiff Emma received therefrom was caused in part by her own negligence contributing thereto. Whatever injury was received from these sharp points was caused primarily by the fall which occurred because of her walking against the wire rope. This fall was manifestly occasioned by her own negligence. The allegation that she was using all due care to avoid the wire is incompatible with the fact shown by the complaint that she had been for a long time familiar with the position of the wire. Being so familiar, it is apparent that unless some extraordinary circumstances intervened which made it necessary for her to walk close to the wire it was entirely unnecessary for her to come in contact with it. No such extraordinary circumstances are alleged. The fact that, knowing the position of the wire, she nevertheless walked against it when there was no necessity for going near it proves that she could not have used due care to avoid it. The allegation of due care is therefore unavailing and must be disregarded. It was her own neglect that caused her to fall, and that neglect contributed to the injury which she received from the sharp points at the bottom of the wire. Conceding, though not deciding, that defendant was also guilty of neglect in allowing the points near the ground at the end of the wire to remain without protection or guard,

the case merely becomes one where the contributory negligence of the plaintiff in part caused her injury. In such cases the plaintiff cannot recover for the portion of the injury caused by the defendant's negligence.

The judgment is affirmed.

Sloss, J., and Angellotti, J., concurred.

[Crim. No. 1274. Department One.—December 21, 1906.]

THE PEOPLE, Respondent, v. THORNTON D. CONNESS,
Appellant.

CRIMINAL LAW—ALLOWING WIFE IN HOUSE OF PROSTITUTION—SUFFICIENCY OF INFORMATION—LANGUAGE OF STATUTE—INTENT OF PROSTITUTION NOT INCLUDED.—An information following the words of the statute of 1891 (Stats. 1891, p. 235) and charging that defendant did willfully, unlawfully, and feloniously "connive at, consent to, and permit the placing and leaving" of his wife "in a house of prostitution," specified, and did in like manner "allow and permit his said wife to remain in a house of prostitution," is sufficient, and need not aver the facts not embodied in the statute, that she became a prostitute therein nor that there was an intent on his part that she should do so.

Id.—OTHER OCCUPATION IN BAWDYHOUSE—REASONABLENESS OF STATUTE—PUBLIC POLICY.—Though there is no moral turpitude *per se* in the occupation of cook, seamstress, or housemaid, yet it is not absurd or unreasonable or an undue restriction of the right to labor to forbid a husband from placing or leaving his wife or allowing her to remain in such occupation in a bawdyhouse, which is a place of the utmost moral pollution and social degradation, the existence and continuance of which a sound public policy and the avowed policy of the law requires should be discouraged and prevented. Such restrictions are in harmony with other restrictions upon bawdyhouses in the Penal Code and consistent with the public policy which they are intended to enforce.

Id.—DEGREE OF PUNISHMENT—FELONY—MISDEMEANORS—LEGISLATIVE DISCRETION—CONSTITUTIONAL LAW.—Although the offense in question is made a felony, with the possible punishment of ten years in the state prison, while other offenses in bawdyhouses are made misdemeanors only, yet this inconsistency, conceding it to be such, is purely a matter of legislative judgment and discretion; and in view of the evils which this statute aims to prevent, and the large discretion of the legislative department of the state in such matters

of policy, it cannot be said that this statute is in conflict with the prohibition of the constitution against the infliction of cruel and unusual punishment.

ID.—EVIDENCE FOR DEFENSE—PROVINCE OF JURORS—IMPROPER REFUSAL OF INSTRUCTION.—Where there was evidence for the defense that he was anxious to have his wife leave the bawdyhouse, and tried to induce her to do so, the credibility of such evidence was within the exclusive province of the jurors; and it was error to refuse an instruction to the effect that if the jury found from the evidence that no other facts were established in the case than that defendant was a married man whose wife resided in a house of prostitution, and that defendant knew that she was residing therein, they should permit no presumption of law against defendant from these facts, and it was their duty under the law to acquit him.

ID.—CONSTRUCTION OF STATUTE—MEANING OF "ALLOW."—The word "allow" used in the statute means more than mere "abstinence from prevention," as defined by the court in instructing the jury. It has almost the identical meaning of the word "permit," also used in the statute, and implies some sort of assent, active wish, or at least willingness, in his mind after he has knowledge of her presence in the bawdyhouse that she should continue there; something more than mere indifference to her whereabouts, or passive sufferance, in a case where the circumstances do not call upon him to interfere with her conduct. If he did not, in the first instance, directly or indirectly connive at, consent to, or permit of her going there, he must to some extent be an accomplice to her remaining there after he has knowledge of the fact.

ID.—CONFUSING PART OF INSTRUCTION—DUTY AS TO PRESUMPTION OF LAW.—That portion of the instruction refused, that "it is still your duty to permit no presumption of law from these facts to be raised against the defendant," though technically true, renders the instruction somewhat confusing, and might well have been eliminated, though it does not, in connection with the other parts of the instruction, render it erroneous as a whole.

ID.—CROSS-EXAMINATION OF WITNESS FOR PROSECUTION—GENERAL QUESTIONS—DISCRETION OF COURT.—The court had discretion to refuse to allow general questions by the defendant on cross-examination of witnesses for the prosecution, as to whether or not they had previously talked with certain persons about their testimony, without any definite aim or disclosure of any specific statement of the witness inconsistent with his testimony, or of any declaration or conduct affecting his motive or showing bias. There must be a very clear and flagrant abuse of the discretion of the court in restricting a cross-examination, and apparent injury therefrom, to justify this court in reversing a case on account of it.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Ewing, Thompson & Prince, for Appellant.

U. S. Webb, Attorney-General, and Geo. W. Jones, District Attorney, for Respondent.

SHAW, J.—The information in this case charges that the defendant did “willfully, unlawfully, and feloniously connive at, consent to and permit the placing and leaving of one Mary L. Conness, who was then and there the wife of him, the said Thornton D. Conness, in a house of prostitution, known as the ‘Diamond Palace,’ situate at the corner of Tulare and E sts., in the City of Fresno, and did then and there willfully and unlawfully and feloniously allow and permit his said wife to remain in said house of prostitution; contrary,” etc. The defendant was tried and convicted on this charge and was sentenced to a term of six years in the state prison. He appeals from the judgment and from an order denying his motion for a new trial.

The first point presented on the appeal from the judgment is that the information does not charge a public offense. The defect asserted is that it fails to aver that the acts of the defendant were done with the intent, on his part, that his wife should devote herself to prostitution while she was in the house in which he had placed her and permitted her to remain. It is argued that a woman may be in a bawdyhouse as a cook, seamstress, or housemaid, without herself engaging in the practice of prostitution, and that the statute, according to what is claimed to be its true effect and purpose, does not forbid a husband to place or leave his wife in such a house, or to allow her or permit her to remain therein, unless she there becomes a prostitute, nor unless he intends that she shall do so. The information follows the words of the statute, which are as follows:—

“Any man who by force, fraud, intimidation, threats, persuasions, promises, or any other means, places or leaves, or procures any other person or persons to place or leave his wife in a house of prostitution, or connives at, consents to, or permits the placing or leaving of his wife in a house of prostitution, or allows or permits his wife to remain therein,

shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the state prison for not less than three years nor more than ten years." (Stats. 1891, p. 285.)

There is nothing in the language of this statute which expresses the idea that the wife must be placed or allowed to remain in the house for the purpose of having her engage in prostitution therein. If such element constitutes a necessary part of the offense, it must be read into the statute by some process of constructive interpretation. We do not think it was so intended. The fact that no words expressing that idea are inserted in the statute, when a very few words would have sufficed for that purpose, is a strong indication of the legislative intent that the offense should be complete without it. It is indeed conclusive on that point, unless there is something in the nature of the acts described as constituting the offense, or in the circumstances attending them, which requires the court in construing the language to disregard the ordinary meaning of the words and add a thought not expressed thereby,—something which makes its literal meaning so absurd or unreasonable as to compel the conclusion that the legislature could not have so intended it. Nothing producing this effect appears.

There is, it is true, no moral turpitude in the occupation of cook, seamstress, or housemaid. All are honorable vocations which every female has a legal right to pursue, and they are entirely consistent with virtue, chastity, and refinement. But it by no means follows that it would be absurd or unreasonable, or an undue restriction of the right to labor, to forbid a husband from placing or leaving his wife in such a place, or from allowing her to remain there, for the purpose of engaging in such innocent occupation. It would not be unreasonable or absurd, or an undue restriction of personal liberty, to forbid all persons from remaining in a bawdyhouse, nor to forbid any person from allowing, or permitting another to remain there, in the sense in which the words "allow" and "permit" are used in this statute.

A bawdyhouse is a place of the utmost moral pollution and social degradation. It is a well-known fact that such places, though perhaps to some extent inevitable, are among the most serious and threatening of the dangers to the physical and moral well-being of the human race. A sound public policy

requires that their existence and continuance should be discouraged, discountenanced, and prevented by all possible legal means. This is the avowed policy of the law. By the Penal Code it is made a misdemeanor to keep such a place, or to reside therein (sec. 315); or to let an apartment or tenement, knowing that it is to be used for such purpose (sec. 316); or to admit a minor of either sex thereto for any purpose whatever, or for any parent or guardian of such minor to sanction or connive at the admission of a minor to any such house or to any room thereof (sec. 309); or, by invitation or device, to prevail upon any person to visit such a house, regardless of the purpose of such visit (sec. 318); or for any person having messengers for hire to send any minor engaged in such work to serve any inmate of such house or to enter the same (sec. 273e); or, except in the case of a California Indian, to live in or about such house for any purpose (sec. 647).

The provision that a husband shall not allow or permit his wife to remain in a house of that character, even to engage in an innocent or otherwise useful occupation therein, is in complete harmony with these restrictions, and is entirely consistent with the public policy which they are intended to enforce.

There are good reasons for the view that the legislature intended the statute to be effective according to its literal import. Vice is contagious, and environment is usually potent in forming or influencing character. It is almost impossible that a chaste woman should long remain in such vile surroundings without herself becoming vile. No woman decent at heart would submit to it for a moment except from the direst necessity. It may have been the purpose to protect married women from exposure to such influences by forbidding the assent of a sordid or vicious husband to her presence there for any purpose. Again, it is inconceivable that a husband would with a willing mind assent that his wife should become an inmate of a house of ill-fame for any purpose, unless he intended or expected that she should be a prostitute therein. Any claim that she was there for any decent purpose would, in the vast majority of cases, be the merest pretense to cover the real purpose. The exceptions would be so few and so unworthy as to require no consideration or protection from

the law. Nevertheless, owing to the depraved character of those who would usually be the only persons cognizant of the facts, and the inherent difficulties of obtaining other than inferential evidence of the facts of intent and of actual prostitution, it would be difficult to prove them to the satisfaction of a jury beyond reasonable doubt if they were made necessary to constitute the crime. And yet both facts would almost invariably exist in every such case, where the relations between the spouses were harmonious. Proof of the facts that a wife inhabits a house of ill-fame and that the husband consents, or willingly suffers it, would create a strong inference, almost amounting to a presumption, that she is unchaste and that he intends that she shall be. To require averment of these facts, which practically always accompany those mentioned in the statute, would not only tend to some extent to encourage such places by permitting married women to work therein, but, by making convictions much more difficult in every case, it would also often serve to defeat the purpose of the statute, so far as it was really intended to prevent a vile husband from profiting by the prostitution of his wife. The legislature may have believed that such purpose could best be accomplished by the absolute inhibition of a life by the wife in such a place with the assent of the husband, even for an innocent purpose, or at least by providing that his intentions as to her conduct while remaining therein should be immaterial in averring or proving the offense.

It may be suggested that the making of such acts a felony, with the severe punishment of ten years' imprisonment in the state prison which the law authorizes, puts it out of harmony with the other statutes above referred to, which make acts of similar character misdemeanors only, with a comparatively slight punishment. This inconsistency, conceding it to be such, is purely a matter of legislative judgment and discretion, and it does not render the literal effect of the statute under consideration so unreasonable or absurd as to require a different interpretation. The degree of the offense and the severity of the punishment to be imposed are subjects for the legislative determination, and usually have but little bearing on the question of the interpretation of the law, but are to be considered chiefly upon the question whether or not the punishment is so severe that it violates the prohibition of the

constitution against the infliction of cruel and unusual punishment. In view of the evils which the statute aims to suppress, and the large discretion of the legislative department of the state in such matters of policy, it cannot be said that this statute is in conflict with this provision of the constitution.

We are of the opinion that the information sufficiently charges a public offense, under the statute above quoted, and that it is not necessary in a prosecution for such offense to allege or prove either that the wife followed the practice of prostitution after becoming an inmate of the house or that the husband intended that she should.

It is freely admitted that there may be cases where a wife may visit such a house with the consent of her husband and in which he would not be guilty of any offense under this statute; as, for instance, if she goes for charitable purposes, or to induce the inmates thereof to reform. No difficulty would be found in disposing of such cases, even if we may imagine that some prosecutor will be inveigled into charging such a person with crime, or foolish enough to do so with full knowledge of the circumstances. It would be a case for the application of the old rule whereby a surgeon who attended to the duty of bleeding a sick person in the streets was held to be not guilty of a violation of the law which in express terms made it a crime to let blood in the street.

The following instruction was asked by the defendant and refused by the court: "You are further instructed that if you find from the evidence, beyond all reasonable doubt and to a moral certainty, that the defendant in this case was a married man, that his wife resided in a house of prostitution, and that this said defendant knew that she was residing therein, it is still your duty to permit no presumption of law from these facts to be raised against this defendant, and if no other facts are established in this case except the foregoing, it is your duty under the law to acquit this defendant."

We are of the opinion that the defendant was entitled to have this instruction given. There was much evidence in his behalf to the effect that he was anxious to have her leave the house, and that he tried in various ways to induce her to abandon the life she was leading. A good deal of it was not of a character to inspire belief. But this was a matter within the

exclusive province of the jurors, and it may be that if they had been instructed as requested they would have considered that there was a reasonable doubt that the defendant had anything to do with the presence of his wife in the house, or of his willingness that she should remain therein, or that they would have been in such reasonable doubt in regard to whether any facts were established, except that she was his wife and that she resided in a bawdyhouse with his knowledge. If such was their view of the evidence they should have returned a verdict of acquittal. The statute is in the disjunctive and it declares that if the husband shall "allow" his wife to remain in a house of prostitution he is guilty of a felony. The word "allow" here means more than mere "abstinence from prevention," as the court below defined it in an instruction given to the jury. It has almost the identical meaning of the word "permit", also used in the statute. It implies some sort of assent on the part of the husband. There must be some active wish, or at least willingness, in his mind, after he has knowledge of her presence in the house, that she should continue there; something more than mere indifference to her whereabouts or passive sufferance in a case where the circumstances do not call upon him to interfere with her conduct. Where he does not, directly or indirectly, place or leave her in the house, or connive at, consent to, or permit of her going there (using the word "permit" in the same sense which we attribute to the word "allow"), he must, to some extent, be an accomplice in her remaining there, after he has knowledge of the fact. The defendant was entitled to an affirmative statement from the court such as that contained in the instruction refused. There is nothing in the instructions given which could serve as a substitute for this instruction. On the contrary, the definition of the word "allow" given by the court implies that the defendant could be guilty although he did not wish his wife to remain in a house of prostitution, had nothing to do with her going there, and was a party to her being there only by reason of the fact that he took no active steps to remove her therefrom. The instruction as asked is rendered somewhat confusing, and certainly less clear, by the interpolation of the phrase "it is still your duty to permit no presumption of law from these facts to be raised against this defendant." Although this statement is tech-

nically true, it might well have been eliminated from the instruction. It does not, however, in connection with the other parts of the instruction, render it erroneous as a whole.

Complaint is made that the court unfairly restricted the cross-examination of the witnesses for the prosecution by refusing to allow general questions as to whether or not they had previously talked with certain persons about their testimony. This is a subject upon which the trial court has much discretion, and usually its exercise of the discretion will not be interfered with on appeal. In the present case, it did not appear that counsel had in view the disclosure of any specific statement of the witness inconsistent with his testimony, or of any declaration or conduct affecting his motive, or showing interest or bias. It appeared that the questions were asked without definite aim, and in the mere hope that by repeated questions something of value to the defendant might be elicited. The court properly refused to allow such a course. A trial is not had for the purpose of allowing the defendant an opportunity to discover evidence in his behalf, but to enable him to produce such evidence as he may desire. If counsel, in good faith, had the expectation that the questions would elicit impeaching testimony, they must or should have known something of its character, and they should have stated to the court, specifically, what they expected in that regard. The court may, in its discretion, allow such questions without a previous declaration, where it appears that the declaration may serve to warn an unfair witness in time to allow him to prepare his answer, but it may also refuse to do so, in its discretion. There must be a very clear and flagrant abuse of this discretion, and a positive and apparent injury therefrom, to justify this court in reversing a case on account of it. Many other exceptions are noted in the record and discussed to some extent in the briefs, but they are of slight importance and we deem it unnecessary to consider them.

The judgment and order are reversed and the cause remanded for a new trial.

Angellotti, J., and Sloss, J., concurred.

[S. F. No. 4737. In Bank.—December 27, 1906.]

EDWARD LYNCH, Petitioner, v. SUPERIOR COURT OF
THE CITY AND COUNTY OF SAN FRANCISCO,
etc., et al., Respondents.

MANDAMUS — CONTINUANCE FOR SICKNESS OF PARTY — DISCRETION OF COURT.—A writ of mandate will not lie to control the discretion of the court in refusing a continuance, notwithstanding the sickness of a party preventing his attendance on the court. Such sickness does not *ipso facto* require the court to grant the application. It is for the trial court in all cases, except where otherwise expressly provided by statute, to determine whether or not the circumstances shown upon an application are such as to make it proper that a continuance should be granted, and its conclusion thereon will not be disturbed unless there has been a plain abuse of discretion.

APPLICATION for Writ of Mandate to the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Edward Lynch, and Bertin A. Weyl, for Petitioner.

THE COURT.—The application for a writ denied.

In denying the application, it is proper to say that the sickness of a party to an action, preventing his attendance on the court, does not *ipso facto* require the court to grant an application for a continuance, made on his behalf. It is for the trial court in all cases, except where otherwise expressly provided by statute, to determine whether or not the circumstances shown upon an application for a continuance are such as to make it proper that a continuance should be granted, and its conclusion thereon will not be disturbed unless there has been a plain abuse of discretion. We make this statement in view of the fact that it is alleged in the petition that in granting continuances heretofore made, the court said that it was of the opinion that it is not a matter of discretion with the court to refuse a continuance, where it is made to appear that the defendant is unable by reason of sickness to

appear. There is no decision of this court which can be properly construed as denying the discretion of the trial court in such cases.

[S. F. No. 3566. In Bank.—December 27, 1906.]

SUSAN A. MARTIN et al., Respondents, v. SOUTHERN PACIFIC COMPANY, Appellant.

NEGLIGENCE—INJURY TO TRAVELER AT RAILROAD-CROSSING—CONTRIBUTORY NEGLIGENCE.—Though the contributory negligence of a traveler at a railroad-crossing in failing to take reasonable precautions to ascertain whether a train is approaching and to look carefully at the most available and convenient distance from the track from which an observation can be made, will preclude a recovery for resulting injury, notwithstanding the negligence of the railroad company in failing to give the proper warning or signal on approaching the crossing; yet contributory negligence on his part can only result from the fact that if he looked from a point of observation near the crossing, he could have seen the train approaching and have avoided it.

ID.—POWER OF OBSERVATION OF TEAMSTER—ACTION FOR DEATH—CONTRIBUTORY NEGLIGENCE A QUESTION OF FACT—NONSUIT—NEW TRIAL.—In an action by the wife and children of a deceased teamster for his death at a railroad-crossing from collision with an approaching train which gave no signals, where there was no field of observation until a warehouse corner was approached, and where, under all the evidence, it was a question of fact for the jury to determine, as affecting the question of contributory negligence, whether had the deceased looked down the track when he approached the warehouse corner he could have seen the train then approaching half a mile away, and whether the train could have covered that distance while he was crossing the track, the court, after having granted a nonsuit for contributory negligence of the deceased, did not err in granting a new trial to the plaintiffs.

ID.—REVIEW OF NONSUIT—ERROR OF LAW.—A ruling granting a nonsuit, if excepted to and specified as such, may be reviewed upon appeal as an error of law.

ID.—STATEMENT AND BILL OF EXCEPTIONS—NOTICE OF INTENTION—SPECIFICATIONS.—A statement and a bill of exceptions may be incorporated in the same paper; and where both were settled as such, and the ruling granting the nonsuit and the exception to it appeared in the substantive part of the case, no other specification of error was necessary than that contained in the notice of inten-

tion to move for a new trial embodied in the bill of exceptions, giving as one ground of the motion errors of law occurring at the trial and excepted to by plaintiffs. A specification of particular errors relied upon, though required in a statement, is not required in a bill of exceptions.

APPEAL from an order of the Superior Court of Alameda County granting a new trial. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

A. A. Moore, for Appellant.

W. W. Foote, and **Vogelsang & Brown**, for Respondents.

LORIGAN, J.—This action was brought by plaintiffs, the wife and minor children of Joseph Martin, to recover damages for his death, claimed to have been caused by the negligence of defendant in the operation of its railroad.

This appeal is taken by the defendant from the order granting plaintiffs a new trial after a judgment of nonsuit had been entered against them upon the trial of the action in the court below.

The accident resulting in the death of Martin occurred at a crossing next to the town of Irvington, in Alameda County, on September 6, 1894. The railroad track at this point runs north and south, and is intersected by a road known as the Mission road, running east and west. The Mission road is sixty-six feet wide. The right of way of the defendant is sixty feet wide, the main line of track being located in the middle of it, the rails being a fraction over twenty-seven feet from the east-and-west lines of the right of way. On the corner formed by the intersection of the easterly line of the right of way and the northerly line of the Mission road is located what is known as Vollmer's warehouse, which extends about one hundred feet northerly along the right of way, and easterly about one hundred and fifty feet on the Mission road. Further north of Vollmer's, and also on the edge of the right of way, is located another warehouse. In front of these warehouses, and between them and the main-line track, was a switch or siding which extended some five hundred feet north of the crossing. The platforms of said warehouses, which were four and a half feet in height, extended westerly so as

to reach the floors of box-cars stationed on the switch, the platform to the north being much wider than the Vollmer platform, in order to meet the curve of the switch as it joined the main track. The distance from the corner of Vollmer's warehouse to the nearest rail of this side-track was twenty-nine feet four inches, and from the center of the near rail of said side-track to the nearest rail of the main track the distance was twelve feet eleven inches. At the time of the accident there were several freight box-cars of defendant—the evidence is uncertain as to the number—standing on said siding, one of these extending some distance into the Mission road. These box-cars were from thirty-four to forty feet long, extended two feet beyond the rails of the side-track, and stood next the platform in front of Vollmer's warehouse.

The deceased was a farmer and teamster, a man of good hearing and eyesight, who had been accustomed for several years to drive teams on the road over this crossing where he was fatally injured. On the afternoon of the day of the accident he was driving a team of heavy horses harnessed to an empty open-gearred lumber-wagon, and was sitting astride on the reach near the center, at least eleven feet from the front end of the wagon-pole. The reach of the wagon stood two and one-half feet from the ground and the deceased was a man about five feet nine inches in height. He had driven from the town of Mission San Jose down-grade toward Irvington and this railroad-crossing westerly on the Mission road at a slow trot. When some two hundred and fifty feet from defendant's right of way the evidence shows that his view of defendant's track was practically obscured by trees and buildings, including the warehouses mentioned above. As deceased came down about the corner, or close to the corner, of Vollmer's warehouse on the defendant's right of way (the exact spot seems to have been indicated by a witness on some diagram used on the trial, which diagram is not in the record), he stopped his team and sat in the attitude of one listening. How long he so remained does not appear. It does appear, however, that, though he stopped to listen, he did not look or attempt to look either at this point or at any other time after he started toward the crossing, although there was evidence that through the space between the warehouse and the box-cars on the switch, something over seven feet, an observa-

tion might be had by a person standing in the Mission road along defendant's track for some two thousand feet northerly in the direction of Niles. After stopping to listen, deceased started his team into a walk towards the crossing, going very slowly up a raise in the road approaching it. As he cleared the box-car, which was extending into the Mission road on the siding, he looked down the track, discovered the train, immediately whipped up his team, which was on the main track at the time, and endeavored to clear it. The train, however, struck the hind wheel of the wagon, threw him from it, and in the fall he sustained injuries which caused his death. The train which collided with the wagon of deceased was a special freight-train, and there was evidence in the case tending to show that no bell or whistle or other signal was given of the approach of the train towards the crossing, and that it approached it on a descending grade at the rate of from thirty-five to forty miles an hour.

With this statement of the general features of the evidence, we approach the merits of the appeal, calling attention to other items of evidence as we proceed.

The only question in the case is whether, upon the evidence, the court was warranted in holding, as a matter of law, that the decedent was guilty of contributory negligence in approaching the crossing. While originally so holding, upon the motion for a nonsuit, the trial court was satisfied upon a more particular consideration of the evidence upon the motion for a new trial that the question of deceased's contributory negligence was properly for the jury, and we think this conclusion was correct.

In granting the nonsuit, as it appears from the grounds of defendant's motion therefor, the court was of the opinion that the evidence showed that while defendant, when near the crossing, listened for an approaching train, he was guilty of contributory negligence in failing to look northerly along the track when he reached the corner of Vollmer's warehouse on defendant's right of way, from which point, as we have said, there was evidence that the track could have been seen for two thousand feet. And the court must have assumed in this connection that the testimony showed that had the deceased so looked at this point he would have discovered the approaching train.

There can be no question but the law is well settled in this state that a traveler upon a highway approaching a crossing must take all reasonable precautions to ascertain whether a train is approaching. In this regard the imperative duty is cast upon him to listen carefully and to look carefully at the most available and convenient distance from the track from which an observation of it can be made, and when the act of listening and looking may be reasonably effective, that notwithstanding the employees operating a train may be guilty of negligence in failing to give the statutory signals or warnings of its approach to a crossing, still if at a convenient point near the track a traveler could have discovered the approach of the train by the exercise of his senses of hearing and sight, and hence avoided the danger in which he placed himself, his failure to do so will constitute contributory negligence precluding a recovery from those who are equally negligent with himself. (*Herbert v. Southern Pacific Co.*, 121 Cal. 227, [53 Pac. 651]; *Green v. Southern Cal. Ry. Co.*, 138 Cal. 1, [70 Pac. 926]; *Green v. Los Angeles Term. Ry. Co.*, 143 Cal. 31, [101 Am. St. Rep. 68, 76 Pac. 719].)

But it will be observed that as far as the duty of the traveler upon the highway to look is concerned, contributory negligence on his part in failing to do so can only result from the fact that, if he looked from a point of observation near the crossing, he could have seen the train approaching and have avoided it. It is only when, if he had made the observation, he could have seen the coming of the train that he can be said to have been negligent in omitting to do so.

The trial court in granting the nonsuit necessarily assumed that the evidence showed that when deceased reached the corner of the warehouse the train was approaching along the two thousand feet of track open to observation from that point, and that had he looked he would have seen it; but we think, as the lower court doubtless did on the motion for a new trial, in its review of the evidence, that whether the train at the time when deceased could have looked had reached a point where he could have seen it had he done so was, under the evidence, a question for the jury.

The witness Christensen, who made the observation as to the distance one could see up the track from the warehouse corner, testified "that a man on the siding, or on the main

track, or anywhere between or at the corner of the warehouse can see a man afoot on the track coming towards Niles for a distance of at least two thousand feet. He can see him until he gets over the little hill that runs down toward Mallard, where the grade would be higher than his head." The evidence of this witness simply fixed the fact that a view of the track from the warehouse corner might be had for the distance stated, but whether the train was anywhere within the field of observation of deceased had he looked from that point was a matter to which other evidence in the case was addressed. Ainsworth, one of the witnesses for the plaintiff, and proprietor of a hotel near the crossing, was watching for the coming of the train, as a guest at his hotel wished to take it if it stopped. He testified that a train would ordinarily be in view a quarter of a mile below the switch (the switch was five hundred feet long) where the track declines and runs down into Niles (doubtless the point called Mallard referred to in Christensen's testimony); that he saw deceased stop his team at the corner of the warehouse and listen; that the witness looked down the track at the same time to see if he could see a train or hear it coming, but did not see anything; that the deceased started towards the crossing, walking his horses very slowly, and that his team was in the middle of the track when deceased looked, discovered the train, and then whipped the horses up in an effort to clear it.

Another witness, Mrs. Brownell, who was in an upper story of the same hotel of which her husband with Ainsworth was proprietor, was watching for the train, as she did daily, because her little child was always anxious to see it pass. She saw the accident, and testified that she looked down the track and saw the train coming; that it was then half a mile away, and deceased was leisurely approaching the track and his team was then about ten feet from it; that this was the first she saw of him; she had not seen him stop to listen.

Under this evidence, considered with all the other evidence in the case, it was for the jury to determine, as affecting the question of contributory negligence, whether had the deceased looked down the track when he approached the corner of the warehouse he could have seen the train then approaching. If the testimony of these witnesses was uncontradicted and the jury were satisfied with the accuracy of their observations

and their capacity to determine distances, it would warrant them in finding that at the time deceased reached the point when he could have looked the train was not in sight. According to Ainsworth, it was not observable at Mallard, a point two thousand feet down the track from which it could be seen, and, according to the testimony of Mrs. Brownell, who was looking from an elevation, it was half a mile away. The testimony of these witnesses may be open to the criticism counsel for appellant subjects it to, but their credibility and the weight to be attached to their testimony were matters for the consideration of the jury. It is insisted by counsel that the truth of the testimony of these witnesses is mathematically impossible, as the train could not have covered the distance of two thousand feet while the deceased was proceeding twenty-seven feet from the corner to the nearest rail of the main track, or at most thirty feet to its center. But if the testimony that the train was going thirty-five or forty miles an hour was true, the train could have covered the distance of two thousand feet in less time than a minute, while it would not be unreasonable for the jury to conclude that it would take more than that time for the deceased to proceed from the warehouse corner to the point of collision. In any event, whether he could or could not was a fact to be determined by the jury.

We think, in view of the testimony referred to, that the case upon the question of the deceased's contributory negligence should have been originally allowed by the court to go to the jury, and in subsequently reaching that conclusion by granting the motion of plaintiffs for a new trial we do not think the lower court committed any error.

There is no merit in the point made by appellant that the lower court erred in granting the motion for a new trial because the motion was presented on a statement of the case and contained no specification of particulars in which the evidence was alleged to be insufficient to justify the decision of the court in granting a nonsuit, or any assignment of error.

The statement, while entitled a statement on motion for a new trial, was also a bill of exceptions, and was regularly settled and allowed as such. Both the statement and the bill of exceptions may be incorporated in the same paper. (*Spotiswood v. Weir*, 66 Cal. 525, [6 Pac. 381].).

The ruling granting the nonsuit and the exception of plaintiffs to it appeared in the substantive part of the case. If excepted to and specified as such, the granting of a nonsuit may be reviewed on appeal as error of law. (*Gerlach v. Turner*, 89 Cal. 446, [26 Pac. 870]; *Malone v. Beardsley*, 92 Cal. 150, [28 Pac. 218].)

In the notice of intention to move for a new trial embodied in their bill of exceptions it was specified, among other grounds of the motion, that it would be made on account of errors in law occurring in the trial and excepted to by plaintiffs. This was all the specification of error that was necessary. Where a party proceeds upon a bill of exceptions the specification of the particular errors upon which he relies is not necessary. It was said in *Shadburne v. Day*, 76 Cal. 355, [18 Pac. 403], and since followed (except in the case of *Miller v. Wade*, 87 Cal. 410, [25 Pac. 487], subsequently overruled in *Barfield v. South Side Irr. Co.*, 111 Cal. 119, [43 Pac. 406]), that "No specification of the particular errors of law on which the appellant will rely is made in her bill. But while this is required in a statement of the case (Code Civ. Proc., sec. 659, subd. 3), it is not in a bill of exceptions (Code Civ. Proc., sec. 650). The point of respondent, therefore, is not tenable." (See, also, *Hagman v. Williams*, 88 Cal. 146, [25 Pac. 1111]; *Barfield v. South Side Irr. Co.*, 111 Cal. 119, [43 Pac. 406]; *Smith v. Smith*, 119 Cal. 183, [48 Pac. 730, 51 Pac. 183]; *Harper v. Gordon*, 128 Cal. 489, [61 Pac. 84].)

The order appealed from granting the new trial is therefore affirmed.

Henshaw, J., Shaw, J., Angellotti, J., and Sloss, J., concurred.

[S. F. No. 3846. Department One.—January 3, 1907.]

ALBERT MEYER, Respondent, v. CITY AND COUNTY
OF SAN FRANCISCO, Appellant.

DUPONT-STREET BONDS—SPECIAL FUND—JUDGMENT AGAINST CITY NOT
SUPPORTED BY COMPLAINT—FAILURE TO PAY BONDS.—The Dupont-
Street bonds issued by the city and county of San Francisco under

the act of March 23, 1876, for the widening of Dupont Street, were payable only out of a fund to be raised by taxation of lands within a specified district declared to be benefited. All claims against the city were waived, and it cannot be held liable to a personal general judgment. Where no breach of duty was alleged in an action against the city except failure to pay the bonds, the complaint cannot support a judgment against the city.

ID.—FUND NOT ALLEGED NOT PRESUMED—MANDAMUS NOT SUPPORTED.

—Where the complaint did not allege the existence of a fund sufficient to pay the bonds, such fund cannot be presumed; but the complaint having failed to allege an existing duty and a failure to perform it on demand, cannot support a *mandamus*, which only lies to compel the performance of an act which the law especially enjoins as duty resulting from an office, trust, or station.

ID.—RIGHT OF ACTION TO ESTABLISH BONDS—PREVENTION OF BAR OF STATUTE—PRAYER OF COMPLAINT DISREGARDED.

—Though the plaintiff has no right of action for a general judgment against the city, or for a writ of mandate, yet he is entitled to maintain the action in order to establish the bonds, and to prevent the bar of the statute of limitations thereupon; and a judgment may be rendered establishing the debt for that purpose. The prayer of the complaint for a general judgment against the city may be disregarded as not measuring the plaintiff's rights; and since the complaint entitles him to some relief, a general demurrer thereto was properly overruled.

ID.—ERRONEOUS JUDGMENT UPON PLEADINGS—INTEREST AFTER MATURITY NOT ALLOWABLE.

—Not only was the general judgment against the city erroneous, but it was further erroneous in rendering judgment upon the bonds for interest after maturity, for which the statute does not provide. The provision is only for coupons to be attached for each year's interest accruing up to the time of maturity; and no coupons being attached for interest accruing after maturity, the statute must be understood as intending that no such interest was to accrue. Section 1917 of the Civil Code does not apply.

ID.—OVERISSUE OF BONDS—VALIDITY—INSUFFICIENT DEFENSE.

—In case of an overissue of the bonds, they would all be valid except those issued after the limit was reached; and a defense alleging such overissue without alleging that plaintiff's bonds were included in the overissue is insufficient.

ID.—EFFECT OF LIMITED JUDGMENT—PARTIES NOT AFFECTED—RIGHTS OF PROPERTY-OWNERS.

—The limited judgment establishing the bonds and removing the bar of the statute may be rendered without making the property-owners parties; but a judgment having that effect against the city alone would not bind the owners of the property nor estop them from showing that the bonds were invalid or not enforceable for other reasons.

ID.—QUESTIONS AFFECTING PROPERTY-OWNERS.

—The questions whether in view of the recitals on the face of the bonds the defense of overissue can be raised against the plaintiff, and whether judg-

ments enjoining the tax-collector from collecting the tax against certain property-owners, bind the city and the bondholders who were not parties thereto, are questions which should not be determined in the absence of the property-owners as parties.

Id.—REVERSAL OF JUDGMENT—PARTIES.—Where the case is remanded by reason of the erroneous judgment, the property-owners should be made parties, if plaintiff desires to attempt in this action to obtain judgment for any relief other than the special relief grantable against the city alone.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Franklin K. Lane, City Attorney, Percy V. Long, City Attorney, D. Freidenrich, and Naphtaly, Freidenrich & Ackerman, for Appellant.

Rosenbaum & Scheeline, for Respondent.

SHAW, J.—This is an action to recover of the defendant the amount due upon thirteen Dupont-Street bonds, issued by the defendant and held by the plaintiff. A general demurrer to the complaint was overruled by the court below, the defendant answered, and thereupon, upon motion of plaintiff, judgment was entered for the plaintiff upon the pleadings, from which the defendant appeals.

The complaint alleges the execution of the bonds, sets forth one of them *verbatim*, states that the others are of the same tenor and effect, differing only in the number, avers that the plaintiff is the holder of the bonds, and that the sum of money named in the bonds is due from the defendant to the plaintiff and is unpaid, although payment of the same has been demanded. The bonds became due, according to their terms, on January 1, 1897. The suit was begun on December 31, 1900. The prayer is for an ordinary judgment against the defendant for the amount of the bonds sued on and for costs of the action. The bonds state on their face that they were issued under the provisions of the act of March 23, 1876, for the widening of Dupont Street, and that they were to be paid out of the fund to be raised by taxation as provided in that act. The provisions of the act referred to are thus made a

part of each bond. The fund in question was to be raised by means of a special tax, to be levied annually for twenty years upon the lands within a certain district described in the act, in a sufficient amount each year to pay the annual interest on the bonds and one twentieth of the principal thereof. Separate annual levies were to be made, one for the interest and the other for the annual installment of the principal. Section 22 of the act is set forth in full in each bond, with the statement that the bond is issued by the city and taken by the holder thereof under the conditions therein expressed. This section declares in substance that the completion of the work of widening the street as provided in the act, should be deemed an acceptance by the landowners of the lien created by the act for the tax to be levied, and should operate as a waiver by the holders of the bonds of all future claim upon the city and county of San Francisco for any part of the debt created by the bond. The record is silent as to the date of the completion of the work provided in the act, but as no question is raised concerning it, we will assume that it was completed before the suit was begun.

The effect of these provisions and conditions is that there is no obligation on the part of the city and county of San Francisco to pay the bonds, and that the amount named therein never became due from the defendant as alleged. The bonds were to be paid out of a special fund, to be raised by certain city officers by means of a special tax upon the lands within a specified district, declared to be benefited by the improvements. All claims against the city for any part of the debt was waived, and the debt was due out of the funds to be raised in accordance with the provisions of the act, and not otherwise. It never became a general obligation of the city, to be enforced by a personal judgment against it, such as that prayed for in the complaint.

The judgment so obtained cannot be upheld under the allegations of the complaint. *Mandamus* lies to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. To authorize a writ, the complaint must show an existing duty and a failure to perform the same on demand. (*People v. Romero*, 18 Cal. 91; *Crandall v. Amador Co.*, 20 Cal. 75; *Oroville etc. Co. v. Plumas Co.*, 37 Cal. 363.) No breach of duty is alleged

except the failure to pay the bonds. Under the provisions of the act, that duty could not arise until there had been sufficient funds raised by the special tax applicable to these bonds to pay the same. (*Cramer v. Sacramento*, 18 Cal. 384.) This fund may or may not have been raised. It is not alleged, and it is not to be presumed.

But although no action could be maintained to recover a general judgment against the city for the money due on the bonds, and the complaint is insufficient to authorize a writ of *mandamus*, conceding that a *mandamus* suit to enforce payment of the bonds would lie against the city in any case, we think that the plaintiff may nevertheless maintain an action against the city on the bonds, not to enforce payment thereof, but to establish and perpetuate them as a claim upon the funds to be raised under the act, and to prevent the bar of the statute of limitations. At the time the action was begun but one day remained of the period of limitation. By the expiration of that period the plaintiff would have been barred forever of all right to enforce payment of the bonds, which the demurrer admits to be valid and unpaid. The delay was not the fault of the plaintiff. Circumstances might exist under which it would not be the fault of the defendant or its officers, and in which plaintiff could not force payment by *mandamus*,—as, for instance, if the officers, although exercising reasonable diligence, had been unable to collect the tax until after the period of limitation had run. In such a case the plaintiff would be practically without remedy if he could not maintain an action to prevent the running of the statute against him. Justice requires that he shall have some means of preventing his claim from becoming outlawed. No better or more appropriate remedy can be suggested than that of an action of the character above indicated.

In this conclusion we are supported by the example of the federal courts in a somewhat analogous case. Those courts have no original jurisdiction to issue writs of *mandamus*. The writ can only issue after judgment and in aid of its enforcement and execution. (*United States v. County Court*, 122 U. S. 306, [7 Sup. Ct. 1171]; *Labette Co. v. Moulton*, 112 U. S. 217, [5 Sup. Ct. 108].) With respect to bonds which constitute an obligation against a portion only of the county or city, and which do not constitute a general obligation

against such corporation, those courts found themselves in somewhat of a dilemma. The bonds in question there, as here, purported to be issued by the city, or county, respectively, but it was held that they did not constitute a general obligation against the obligor sufficient to authorize a general judgment thereon. In those courts, if no judgment could be obtained, there could be no *mandamus*, and a bondholder would be without remedy therein to enforce his obligation. In this situation it was said "the holder of these bonds cannot have any remedy in the federal courts unless he is entitled to recover a judgment thereon and to enforce such judgment, if necessary, by *mandamus*. . . . It seems to us that the provision that the bonds shall be issued in the name of the county implies a liability on the part of the county to be sued, so far as is necessary to give effect to the rights of the holders of the bonds. . . . This is to be effected by the nature of the judgment we render, which is not a personal judgment against the county, but only a judgment judicially establishing the plaintiff's debt." (*Jordan v. Cass Co.*, 3 Dill. 185, 13 Fed. Cas. No. 7517, p. 1088.) This case was followed by *Cass Co. v. Johnson*, 98 U. S. 360; *Davenport v. Dodge Co.*, 105 U. S. 237; and *Mather v. San Francisco*, 115 Fed. 37. The latter was an action upon some of the Dupont-Street bonds, of which the bonds in suit in this case at bar form a part. Upon similar reasoning we can say that the provision that the bonds here involved should be issued in the name of the city and county implies that the city and county can be sued when necessary to preserve the plaintiff's rights and prevent the bar of the statute of limitations, and that in such action a judgment can be given establishing the debt for that purpose. The prayer of the complaint may be disregarded. It does not measure the plaintiff's rights. The complaint entitles him to some relief, and the demurrer was therefore properly overruled.

We are of the opinion, however, that in giving judgment on the pleadings the court improperly allowed the interest which accrued on the bonds after their maturity. The act in question provided a scheme for a public improvement, the cost of which was to be paid by a special assessment upon the lands in the district specially benefited thereby. For this purpose the assessment district was created, and upon the

real property therein there was imposed the burden of such payment. This burden was laid by the defendant without the consent of the owners of the property. The legislature has power to do this for the purpose of defraying the expense of public improvements, but such statutes are to be construed in favor of the property-owner, at least to this extent, that the burden imposed cannot exceed that which the terms of the statute, either expressly or by fair implication, authorize. This statute not only does not expressly authorize a charge of interest on the bonds after their maturity, but its provisions fairly imply that such interest was not to be paid.

It provides that the bonds should be "payable in twenty years from their date, unless sooner redeemed, as in this act provided," and that they should "bear interest at the rate of seven per cent per annum, payable semi-annually." This language does not necessarily imply that interest is to run after maturity. Coupons for the annual interest, consecutively numbered, were to be attached to each bond in such manner as to be easily removed. It was further provided that a tax should be levied annually upon the lands in the district to pay the interest as it matured, and that the money thus raised was "to be paid out by said treasurer only in payment of the coupons attached to said bonds, as the same from time to time become due," and that at the same time and in the same manner there should be annually levied a tax sufficient to pay one twentieth of the principal, to constitute a sinking fund and which should be paid out only in redeeming the bonds. Provision was made for calls for bonds to be paid in the order of issuance, whenever there was on hand ten thousand dollars or more of the sinking fund. The twenty annual levies thus provided for, if made and collected as required, would fully pay the entire amount of principal and interest of the bonds. We think the provision of the act requiring the interest coupons to be attached to the bonds is to be understood as meaning that coupons were to be attached for each year's interest accruing up to the time of their maturity. There is no provision for the attaching of any coupons for interest accruing after maturity. And in view of the rules of construction applicable to such acts we must hold that there is no authority either to issue such coupons or to attach them to the bonds. The provision that the levy

made for the payment of interest was to be applied "only" to the payment of the coupons implies that no tax was intended to be levied for any interest except that represented by the coupons, and hence that it was not to be levied for interest accruing after maturity. There being no provision for the payment of any interest accruing after maturity, the act must be understood as intending that no such interest was to accrue. The case of *Kendall v. Porter*, 120 Cal. 108, [45 Pac. 333, 52 Pac. 143], is cited to the contrary. We think, however, that the act there construed is easily distinguishable from that here involved. The bonds there under consideration were the general bonds of the city of Sacramento, and both the principal and the interest were to be paid out of a certain fund consisting of a certain proportion of the general annual revenues of the city. This revenue would, of course, continue indefinitely, after the maturity of the bonds as well as before. There was not in that case separate taxes for the interest and the principal, to be applied exclusively for the purposes for which it was levied, nor a specified number of levies to be made for a specified number of years. There was no certainty that the fund provided in that case from the annual revenues of the city would be sufficient to pay the bonds at or before their maturity, as is the case here. The court held that the act not only failed to show an intent to terminate the interest upon the maturity of the bonds, but that it indicated with some clearness an intent that they should bear interest until paid. The provisions and circumstances above noted, which do not exist here, are sufficient in our opinion to distinguish that case from the present one and to require the contrary conclusion as to its effect and purport. The present case is more like those of *Bates v. Gerber*, 82 Cal. 550, [22 Pac. 1115], and *Davis v. Sacramento*, 82 Cal. 562, [22 Pac. 1118], which involved the interest on the coupons which were attached to the bonds in question in *Kendall v. Porter*, 120 Cal. 108, [45 Pac. 333, 52 Pac. 143]. It was held in those cases that the interest coupons did not bear interest after maturity. The court said: "The act provided for the payment of the principal and annual interest and nothing more. There was no other fund out of which the interest demanded could have been paid." So here the act provides that a fund should be raised annually

during the time the bonds were maturing, but no longer, and there is no provision for the payment of subsequent interest. It was said in *Bates v. Gerber*, 82 Cal. 550, [22 Pac. 1115], and *Kendall v. Porter*, 120 Cal. 108, [45 Pac. 333, 52 Pac. 143], that "the statute is the measure of the bondholders' rights." It is also the measure of the property-owners' burden. No provision being made for the payment of any further amount than that of the principal and interest accruing up to maturity, no further interest can be allowed.

Section 1917 of the Civil Code, which provides that "Unless there is an express contract in writing, fixing a different rate, interest is payable on all moneys at the rate of seven per cent per annum, after they become due on any instrument of writing," does not apply here, because, as we construe the act of 1876, it does by fair intendment declare that interest shall not be payable after maturity.

The answer attempts to aver that there was an unauthorized overissue of the bonds. It does not allege any facts showing that the plaintiff's bonds constituted a part of this alleged overissue. The statute appears to contemplate that bonds might be issued at different times until the aggregate issue equaled the authorized amount. In such a case, the bonds would all be valid, except those issued after the limit was reached. The question is raised as to whether, in view of the recitals on the face of the bonds, this defense can be made without an allegation that plaintiff is not a *bona fide* holder. This question, we think, ought not to be decided in the absence of the property-owners, or some one of them at least, who might represent them all. Neither the city nor its officers have any substantial interest in the question. It is the property-owners who must bear the additional burden, if any there be, and none of them are parties to the action.

It is also alleged that certain property-owners have obtained judgments, which remain in full force, perpetually enjoining the tax-collector of the city and county, and his successors in office, from collecting from the lands owned by them any tax levied under the act, that the levies provided for in the act were regularly made each year for the twenty years, as required, upon all the lands in the district, and that the tax has been paid upon all of said lands, except that levied upon the lands protected by the said judgments. It is claimed that these

judgments bind both the city and the bondholders, neither of whom were parties to the actions in which the judgments were rendered. This question is also one in which the property-owners concerned are vitally interested, and which should not be decided until they have an opportunity to be heard. When the case is remanded these property-owners should be made parties to the action, if the plaintiff desires to attempt in this action to obtain judgment for any relief other than to establish the debt and prevent the bar of the statute of limitations. We are satisfied that he can obtain a judgment of this character without making the property-owners parties, but this rule can be allowed only with the qualification that a judgment against the city alone, which merely has that effect, would not bind the owners of the property, nor estop them from showing that the bonds were invalid, or not enforceable, for other reasons.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

[S. F. No. 3976. Department One.—January 3, 1907.]

HIBERNIA SAVINGS AND LOAN SOCIETY, Respondent,
v. CHARLES H. ROBINSON et al., Defendants; CLA-
RENCE W. PURRINGTON, Administrator of Caroline
Robinson, Deceased, Appellant.

FORECLOSURE OF MORTGAGE—PARTIES.—One not made a party to an action to the foreclosure of a mortgage who has any interest in the premises is not affected by the foreclosure decree.

ID.—WRIT OF ASSISTANCE—TITLE NOT TRIABLE—ACTION.—The title of one not a party to the foreclosure suit is not triable upon a proceeding for a writ of assistance in favor of the purchaser at the foreclosure sale; but it can only be determined in an appropriate action brought for that purpose.

ID.—PROTECTION OF POSSESSION—MOTION TO RESTRAIN WRIT.—If a person claiming title who was not a party to the foreclosure suit is in actual possession of the property sold, such possession may

be protected upon motion to restrain the execution of the writ of assistance in favor of the purchaser.

ID.—QUESTION OF FACT—SUPPORT OF FINDING—RIGHTS OF ESTATE UNAFFECTED BY WRIT.—The right to be protected upon a motion to restrain the execution of the writ depends upon the claimant being in possession, which is a question of fact to be determined by the trial court; and where the evidence sustains a finding that the administrator of a deceased claimant never had been in the possession of the premises by tenant or otherwise, the rights of the estate cannot in any degree be affected by the writ, and must be otherwise determined.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing to restrain the execution of a Writ of Assistance. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

George D. Collins, for Appellant.

Tobin & Tobin, for Respondent.

SLOSS, J.—The Hibernia Savings and Loan Society commenced an action to foreclose a mortgage on several parcels of real estate in the city and county of San Francisco. Some of the defendants named in the complaint defaulted, and a decree of foreclosure was made and entered in regular form as against them. The plaintiff became the purchaser at the foreclosure sale, and, no redemption having been made within the statutory time, received the commissioner's deed on October 30, 1902. On May 13, 1903, the plaintiff procured a writ of assistance and delivered it to the sheriff of the city and county for execution. This writ directed the sheriff to put the plaintiff in possession of one of the parcels of land included in the foreclosure proceeding. On May 14, 1903, Clarence W. Purrington, as administrator of the estate of Caroline A. Robinson, deceased, filed in the superior court an affidavit alleging that Caroline A. Robinson at the time of her death was the owner and in possession of the piece of land described in the writ of assistance; that affiant had on the eighth day of October, 1901, been duly appointed her administrator, and ever since had been, and still was, in the actual possession of the property in question. Upon this affidavit

the court below made an order directing the plaintiff to appear and show cause why an order should not be made perpetually restraining the execution of the writ of assistance and restraining the sheriff from in any manner interfering with the possession of Clarence W. Purrington as such administrator. Upon the hearing of the order affidavits and counter-affidavits were read and oral testimony was taken. Thereafter, on the twentieth day of November, 1903, the court made an order discharging the order to show cause. Purrington, as administrator, now appeals from the order of November 20th.

The mortgage had been executed by Charles H. and Thomas B. Robinson. Thomas B. had died before the commencement of the action, and his executors, together with Charles H., were made defendants, and judgment was taken against them. The estate of Caroline A. Robinson was not made a party to the foreclosure proceedings, and her interest, if she had any, was not affected by the foreclosure decree. Nor could her claim of title be adjudicated in a proceeding like the one under review. "The courts will not undertake to settle the conflicting legal or equitable rights of persons not parties to a foreclosure suit, upon an application for a writ of assistance; to adjudicate such rights upon affidavits or on a motion." (*Enos v. Cook*, 65 Cal. 175, [3 Pac. 632].) Any person claiming title to property has the right to litigate the validity of his claim in a proceeding in which the question of title can be properly presented and determined. As this court said in *Ex parte Hollis*, 59 Cal. 405, "If his title is claimed to be invalid or fraudulent and void, he is entitled to be heard according to the forms of law. . . . The issue as to such title should be tried in an appropriate action, in which the verdict of a jury or the findings of a court may be had upon issues properly framed for the purpose of definitely determining the question of title." And if a person not made a party to foreclosure proceedings is in possession under a claim of title, he has a right to protect his possession by the procedure here adopted,—to wit, a motion to restrain the execution of the writ of assistance. (*Pignaz v. Burnett*, 119 Cal. 157, [51 Pac. 48].)

Indeed, these propositions are not contested by the respondent, which concedes that if Purrington as administrator was in possession of the premises at the time of the issuance

of the writ the order asked for by the appellant should have been made. The contention of respondent is, however, that Purrington was not and never had been in possession of the premises. Undoubtedly his right to restrain the execution of the writ of assistance depended upon his being in possession, for if he was not his rights could not in any degree be affected by the execution of the writ. Whether or not he was in possession was a question of fact to be determined by the trial court. In making the order complained of, that court evidently found as a fact that the estate of Caroline A. Robinson was not in possession of the premises, and the only question here is whether that implied finding is sustained by the evidence. A brief statement of the facts shown on the hearing will suffice to demonstrate that there was more than sufficient evidence to support the conclusion reached. It appeared that the person in actual physical occupation of the premises was Walter T. Robinson, a son of Thomas B. Robinson, one of the mortgagors. Thomas B. Robinson and Caroline A. Robinson had been husband and wife. Caroline died in 1891, Thomas in 1897. From the death of Caroline A. Robinson, in 1891, Walter T. Robinson lived upon the premises with his father until 1897, and after his father's death remained there until the time of the hearing in the court below. The real issue between the parties was whether Walter T. Robinson was in possession as a tenant of Purrington, the administrator of Caroline A. Robinson's estate, as asserted by the appellant, or whether he held by virtue of some other claim. At the hearing the appellant introduced an affidavit of Purrington himself, in which he averred that ever since his appointment as administrator he had been in the actual possession of the property. In response to this the respondent offered the affidavit of George A. Clough, denying this allegation on information and belief, and setting forth certain facts which, as is claimed, tend to show that Purrington, Walter T. Robinson, and George D. Collins, the attorney for the appellant, had entered into a fraudulent scheme to retain possession of the said property. We will not further notice these charges of fraud, as we do not deem them important here. Counter-affidavits were filed by the appellant, one being the affidavit of Collins and the other that of Walter T. Robinson, both of which deny the charges of fraud and assert positively that

Purrington was in possession as administrator, Robinson averring that his occupancy of the premises was exclusively under the said administrator and as his agent.

So far as these affidavits are concerned, it may be conceded that the affidavit of Clough, being merely on information and belief, leaves the positive allegations of the appellant's affidavits without substantial contradiction. But at the hearing the respondent called and examined both Purrington and Walter T. Robinson, and their oral testimony was decidedly at variance with their affidavits. Purrington testified that as administrator he had not handled any money, nor made out accounts, nor drawn any rents. While he stated that the property was occupied by Walter T. Robinson as his tenant, he also stated that such tenant did not pay any rent; that he did not know why he let Robinson stay; that during the two years of his administration he (Purrington) had never asked for any rent; that he had not paid any of the bills against said property, such as gas and water charges; that he had not paid any taxes; and that he had never taken any steps to get possession of the property. He testified further that he had never been in the house, and that he did not think he had ever spoken to Walter T. Robinson about the possession of the premises. His only explanation of his failure to ask for rent was that he understood that the tenant was not able to pay. Walter T. Robinson testified that he had been living on the property since 1891; that he had been living there with his father until 1897, and had continued to live there since the death of his father; that he had paid the taxes on the property and the water rates; that the administrator had never asked him for any rents; and that the only conversation they had had regarding the property was that the administrator had asked him occasionally whether he was still living on the property, to which he had replied that he was. He had also stated to the administrator that he had paid the taxes. On cross-examination he testified that while he had paid the taxes he had not given the receipts to the administrator, and that when he did pay the taxes he paid them in the name of his wife, Isabelle W. Robinson.

On this testimony we do not see how the court could have failed to come to the conclusion which was reached,—namely, that the statements in the affidavits of Purrington and Robin-

son to the effect that the latter was holding as tenant of the Caroline A. Robinson estate were collusive and false, and that in fact Purrington as administrator had never been in possession of the premises, either in person or by tenant. Under these circumstances the appellant was not entitled to restrain the issuance of the writ of assistance.

The order appealed from is affirmed.

Angellotti, J., and Shaw, J., concurred.

[S. F. 3783. In Bank.—January 3, 1907.]

CALIFORNIA SHIPPING COMPANY, Appellant, v. CITY
AND COUNTY OF SAN FRANCISCO, Respondent.

TAXATION—ASSESSMENT OF COMMERCIAL VESSELS—REGISTRY AT DOMICILE OF OWNER.—Vessels employed in foreign or interstate commerce, which had not by the manner of their use acquired an actual *situs* elsewhere, are properly assessed for taxation at San Francisco, the port of the domicile of their sole owner, where they are registered under the laws of the United States, regardless of the fact that they were outside of the waters of the State from a date preceding the first Monday in March in the year of the assessment and at the time of the assessment and collection of the tax, and that some of them had never been within its waters.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Charles E. Taylor, and William P. Hubbard, for Appellant.

Franklin K. Lane, City Attorney, Percy V. Long, City Attorney, and W. I. Brobeck, Assistant City Attorney, for Respondent.

ANGELLOTTI, J.—This is an action to recover taxes paid by plaintiff under protest, which had been assessed and levied by defendant for the fiscal year ending June 30, 1903, upon seventeen vessels owned by plaintiff. A demurrer to the

PROCEEDING in Certiorari to review and annul an order of the Superior Court of Lassen County. F. A. Kelley, Judge.

The facts are stated in the opinion of the court.

E. De Los Magee, for Petitioner.

Dodge, Parker & Knight, for Respondent.

ANGELLOTTI, J.—This is a proceeding in *certiorari*, to review an order of the superior court of Lassen County made July 14, 1906, in an action pending in that court. That action was one brought by the California Safe Deposit and Trust Company, a corporation, to enforce by foreclosure the lien created by a certain trust-deed or mortgage given to secure the payment of bonds issued by the Sierra Valleys Railway Company, and covering the railroad property of such last-named company situated in Lassen and Plumas counties. The plaintiff here, the Boca and Loyalton Railroad Company, was made a party defendant in that action, the allegation being that it claimed some interest in the property as purchaser or judgment creditor, or otherwise, which interest was subject to the lien of the plaintiff's trust-deed or mortgage. The relief sought was a sale of the mortgaged property, the application of the proceeds to the payment of the indebtedness, costs, etc., and a judgment against the Sierra Valleys Railway Company for any deficiency that might remain after such application. The Boca and Loyalton Railroad Company, on June 1, 1906, answered in that action, claiming among other things a right of way for two crossings for its railroad over the right of way and track of the Sierra Valleys Railway Company in Plumas County, which crossings had been put in place and were being operated by plaintiff. The claim of plaintiff here was alleged to be superior to the lien of the trust-deed or mortgage, and was based upon an alleged purchase at execution sale, and also upon certain orders made in a condemnation suit brought by said plaintiff in the superior court of Plumas County, which action is still pending. On June 19, 1906, the California Safe Deposit and Trust Company instituted an action in the superior court of Lassen

County against plaintiff here, for an injunction restraining plaintiff from using one of said crossings in the operation of its railroad, the ground thereof being that such use was without right, and would depreciate the value of the mortgage security to the damage of the bondholders and the Sierra Valleys Railway Company. A preliminary injunction in accordance with the prayer of the complaint was thereupon granted. There is a claim that this injunction proceeding was dismissed by the plaintiff on June 30, 1906, but we will here assume that the action was never effectually dismissed, and is still pending. On July 14, 1906, the Sierra Valleys Railway Company, defendant in the foreclosure action, with the express consent of the Nevada-California-Oregon Railway, the holder of bonds secured by the trust-deed or mortgage, presented in the foreclosure suit its notice of a motion, to be made on August 20, 1906, for the discharge and removal of the plaintiff trustee, on the ground that such trustee was seeking, to the prejudice of the bondholders and the Sierra Valleys Railway Company, to dismiss the injunction proceeding. Affidavits presented in connection therewith showed violations by the Boca and Loyalton Railroad Company of the injunction issued in the injunction proceeding. Upon reading and filing the notice of motion, and the accompanying papers, the judge of the superior court of Lassen County, in chambers, and without any notice whatever or opportunity for hearing to the Boca and Loyalton Railroad Company, and without requiring any bond or security, on July 14, 1906, made the order here under review. That order recites that it has been made to appear satisfactorily to such judge by such showing that the Boca and Loyalton Railroad Company, aided and abetted by the trustee, has been using said crossings in violation of the injunction granted in the other proceeding, and that such use is detrimental to the interests of the Sierra Valleys Railway Company and the bondholders, and then provides as follows:—

“Now therefore, it is ordered that so much of the said crossing and of all and singular the track, rails, ties and materials of every kind as are not properly a part of the road-bed, railroad and ties, or either, of said Sierra Valleys Railway Company, which were placed, laid, erected or constructed, or which now lie in, over or upon or across the right of way,

road-bed and track, or either, or any of them, of said Sierra Valleys Railway Company at the point or in the section, township and range aforesaid, be taken up and removed in such manner as may be or may to the person hereinafter appointed for that purpose, seem necessary or proper, and that when so removed the ties and steel and iron so taken up and removed shall be properly placed and safely kept in as good order and condition as the circumstances permit and so that same shall not and may not until further order of this court be had or taken possession of by said Boca and Loyaltan Railroad Company.

“And it is further ordered, that any rail, a portion of which is now or at the time of said removal in place upon said right of way shall be taken up and removed its entire length and not cut unless interference with such removal be made or offered, in which event same may be removed in part or otherwise as circumstances may require.

“And the parties hereto, all and singular, their and each of their agents, servants and employees, and all persons acting or purporting to act under, in aid or assistance, or by permission or authority of them or of either or any of them are hereby required to refrain from any and all acts of violence, and from in any wise interfering with, but any of them may aid, the execution thereof; and said defendant is particularly enjoined not to interfere with, or in any manner obstruct the removal of said crossing, track, rails, ties and materials, in the manner aforesaid, but to permit the same to be done peaceably and quietly, without let or hindrance.

“It is further ordered that P. F. Kinney, of Reno, Nevada, be, and he is hereby appointed as the agent and representative of this court to see that the order is carried into effect according to its true intent and meaning, and with all reasonable dispatch, with authority to and in him to call to his assistance, employ and deputize any and all persons to him seeming to be necessary or proper in so doing and therein to use such means and force as may seem necessary for the proper execution hereof; and he the said P. F. Kinney is hereby instructed to make full report to us of all his proceedings as such agent.

“All costs and charges for the purpose of the enforcement of this order shall be at the sole cost and expense of said Sierra Valleys Railway Company.”

In accord with the terms of this order, the agent appointed by the court, on the fourteenth and fifteenth days of July, 1906, removed said crossing, and holds the rails and ties removed in a safe place and subject to the further order of the court.

On July 26, 1906, plaintiff here moved the superior court to vacate said order, and this motion was denied on the same day.

It is alleged in what is styled a supplemental return, that on July 18, 1906, the court suspended the injunction issued in the injunction proceeding, and that on the same day the Boca and Loyaltan Railroad Company did itself replace the crossing removed, and has ever since continually used the same. These allegations are material only upon the question as to whether this proceeding in *certiorari*, instituted July 30, 1906, is not a moot case, involving no actual controversy.

We know of no rule of law that can be successfully invoked in support of the order under review. It cannot be disputed that its effect was to deprive the Boca and Loyaltan Railroad Company of property of which it was in the peaceable possession, and to take from it property of which it claimed to be, and was in fact, admitted to be the owner, and this, it seems clear to us, was done without the due process of law guaranteed by both federal and state constitutions. Whether it was entitled to have this property remain in the place where it was, constituting a railroad-crossing over the right of way and track of the Sierra Valleys Railway Company, which was its claim made by the allegations of its answer in the foreclosure action, was a question that could only be legally determined in an orderly manner, in consonance with the rules and principles established by our jurisprudence for the determination of controversies as to property rights. The crossing constructed and maintained by it under claim of right could not be legally torn up and converted into mere rails and ties, and those rails and ties, admittedly owned by it, removed and withheld from its possession, without some kind of notice and an opportunity to appear and be heard in support of its claim, for that much certainly is included in the constitutional guaranty that one shall not be deprived of property without due process of law. (8 Cyc. 1084.) It may be admitted that in a proper pro-

ceeding brought to obtain an injunction prohibiting it from using the crossing an order for the issuance of a temporary injunction prohibiting such use might legally have been made without notice. Such was the order made in the injunction case. In such a case the party restrained would, pending the determination of proceedings on his part to dissolve the injunction, be secured by the bond required by our statute to be given. But there is nothing in our law warranting a court in ordering, without notice to the person maintaining the same in place under a claim of right, the removal of such a crossing and the confiscation of the materials composing the same. The order complained of is in violation of the constitutional guaranty heretofore referred to, and is for that reason void. This seems so plain as not to require further discussion. There are other objections made going to the question of the validity of this order, which it is unnecessary here to notice.

It is urged that under section 937 of the Code of Civil Procedure the only remedy in case of an order made without notice to the adverse party is an application to the judge, *ex parte* or on notice, that it be vacated, which application is addressed to the discretion of the court. Manifestly, this provision of law is applicable only to such orders as a court or judge has power or jurisdiction to make without notice. It is not within the jurisdiction of a court or judge to deprive a person of property without due process of law, and a purported order having such an effect may be annulled on *certiorari*.

Our law provides that the writ of *certiorari* may issue only where there is no appeal, and, in the judgment of the court, no plain, speedy, and adequate remedy. (Code Civ. Proc., sec. 1068.) It is suggested that the order complained of is in effect either an order granting a mandatory injunction or an order appointing a receiver, from either of which orders an appeal would lie. (Code Civ. Proc., sec. 963, subd. 2.) Manifestly, it is neither an order granting an injunction nor an order appointing a receiver. It does not prohibit or command the performance of any act by any party to the action, but simply purports, in an ordinary foreclosure action, to empower a third person, who is not a party to the action and who is designated as an agent of the court, to remove and retain the property of petitioner. There is no suggestion in

the record of the appointment of a "receiver," in the sense in which that term is used in law. A receiver may, under certain circumstances, be appointed in a foreclosure proceeding to take possession and control of *the mortgaged property*, but the property here ordered taken admittedly constituted no part of such property. The order was not appealable, and we cannot see that plaintiff had any other plain, speedy, and adequate remedy against the same.

As we understand the record, although plaintiff has reconstructed a crossing at the original place, the materials of the old crossing removed by the agent of the court are still withheld from the possession of plaintiff under the terms of said order, which order the court has refused to vacate, although motion in that behalf was made by plaintiff. Under these circumstances it cannot be held that we have before us only a moot case, involving no actual controversy.

The order under review must be annulled, and it is so ordered.

Shaw, J., Sloss, J., McFarland, J., Lorigan, J., and Henshaw, J., concurred.

[S. F. No. 4647. In Bank.—January 3, 1907.]

BOCA AND LOYALTON RAILROAD COMPANY, Petitioner, v. SUPERIOR COURT OF LASSEN COUNTY, Respondent.

ACTION—APPEARANCE BY ATTORNEY—POWER OF CONTROL.—A plaintiff in an action may either appear in his own proper person or by attorney; but he cannot do both, and if he has appeared by attorney, he has no power of control over the action otherwise than through his original or substituted attorney of record.

ID.—INJUNCTION SUIT BY PLAINTIFF IN FORECLOSURE—IMPROPER DISMISSAL—JURISDICTION—PROHIBITION.—A corporation which, after suing to foreclose a deed of trust of a railroad, brought a separate suit by its attorneys to restrain one of the defendants in foreclosure from using a certain railroad-crossing, could not by filing a dismissal of the injunction suit in its own name divest the court of jurisdiction to make further orders therein; and the defendant sued cannot maintain prohibition to prevent further proceedings in the injunction suit upon the ground that it has been properly dismissed.

ID.—PENDENCY OF MOTION TO DISMISS—OPPOSITION BY BENEFICIARIES—

PRESUMPTION.—The mere making by the attorneys of record for the plaintiff of a motion for dismissal in open court, which is pending and undetermined, and the granting of which was opposed by beneficiaries represented by the deed of trust, could not operate as a dismissal of the suit under subdivision 1 of section 581 of the Code of Civil Procedure, nor divest the court of jurisdiction to decide the motion, which it must be presumed will be correctly determined.

APPLICATION for Writ of Prohibition to the Superior Court of Lassen County. F. A. Kelley, Judge.

The facts are stated in the opinion of the court.

E. De Los Magee, for Petitioner.

Dodge, Parker & Knight, for Respondent.

ANGELLOTTI, J.—Plaintiff seeks a writ of prohibition, restraining the superior court of Lassen County from making any order in a certain action instituted in that court by the California Safe Deposit and Trust Company against plaintiff here other than an order of dismissal. The action referred to was one to obtain an injunction restraining plaintiff here from using a certain railroad-crossing over the road of the Sierra Valleys Railway Company in Plumas County, the facts in regard thereto being detailed in the opinion in *Boca and Loyallon R. R. Co. v. Superior Court of Lassen County*, S. F. No. 4651, *ante*, p. 147, [88 Pac. 715], this day filed. An alternative writ having been issued, the defendant made answer, and the matter has been submitted upon a demurrer to such answer, there being no material conflict as to the matters which are controlling here.

The main contention of plaintiff is that the injunction action has been dismissed by the plaintiff, and that the superior court is, therefore, without jurisdiction to make further orders therein. The action was commenced on or about June 5, 1906. According to the allegations of the affidavit or complaint of plaintiff here, the plaintiff in that action, on June 30, 1906, no counterclaim having been made or affirmative relief sought by the defendant therein, sent its discontinuance in writing of said action to the clerk of said court, with its written request

that he enter a dismissal of the same, all of the costs having been paid. No such entry was made by the clerk, he basing his refusal to so do upon a certain order made by the court restraining him from so doing. On July 18, 1906, plaintiff by its attorneys moved the superior court for a dismissal of said action, there having been no appearance on the part of defendant, and all costs having been paid. That motion had not been decided at the time of the institution of this proceeding.

According to the allegations of the answer, the only written request for or notice of dismissal sent to the clerk was one signed by the plaintiff in said action by its manager, and not signed by any attorney of record, said plaintiff up to that time having appeared in said action by attorney only. It further appears that the subsequent motion for dismissal made by the attorneys on July 18, 1906, has only been partially heard, the further hearing and determination thereof having been continued by the court until the determination of this proceeding.

Plaintiff's position is that under subdivision 1 of section 581 of the Code of Civil Procedure, providing that an action may be dismissed "by the plaintiff himself, by written request to the clerk, filed among the papers in the case, at any time before trial, upon payment of costs; provided, a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of the defendant," the presentation of the proper request to the clerk, and payment of costs, operated to divest the court of jurisdiction to make any further order in the case other than one requiring the clerk to make the proper entry of dismissal in its register. It may be conceded for the purposes of this proceeding that, if the above-quoted provision of law was complied with by the plaintiff in the injunction action, the position of plaintiff here is sustained by the decision of this court in *Hopkins v. Superior Court*, 136 Cal. 552, [69 Pac. 299].

It is, however, the settled law of this state that while a party to an action may appear in his own proper person or by attorney he cannot do both, and that as long as he has an attorney of record in an action the court cannot recognize any other as having management or control of the action, and the party can act only through his attorney. It may be that good reasons can be urged in support of a contrary rule, but

the rule stated is so firmly settled here that we are not warranted in now departing from it. In the early case of *Board of Commissioners v. Younger*, 29 Cal. 147, [87 Am. Dec. 164], the question arose under a statute similar to subdivision 2 of section 581, authorizing an action to be dismissed "by either party upon the written consent of the other," and the lower court had granted the motion for a dismissal of the action based upon the written consent of the plaintiffs in person, which consent was not signed by the attorney of record for plaintiffs. The order of dismissal was reversed by this court. The court said: "A party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney, he must be heard through him, and it is indispensable to the decorum of the court and the due and orderly conduct of a cause that such attorney shall have the management and control of the action, and his acts go unquestioned by any one except the party whom he represents. So long as he remains attorney of record the court cannot recognize any other as having the management of the case. If the party for any cause becomes dissatisfied with his attorney, the law points out a remedy. He may move the court for leave to change his attorney, as provided in section 10 of the act concerning attorneys and counselors. Until that has been done, the client cannot assume control of the case. While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the court unless the same is signed or assented to by such attorney. Such a rule is not only indispensable to the orderly conduct of a cause, but is likewise a safeguard to the client against the intrigues of his adversary." In *Mott v. Foster*, 45 Cal. 72, a stipulation extending time signed by the plaintiff in person where he had an attorney of record was held to be a nullity, and the same was held in *Wylie v. Swain*, 120 Cal. 485, [52 Pac. 809], the court saying that where a party appears and is represented by an attorney of record he cannot himself assume control of the case, and that if he signs a stipulation dismissing the action or extending time for any purpose, the same will be disregarded by the court. All of these authorities are approvingly cited in *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 145, 146, [56 Pac. 797], where the rule was again declared. The general rule thus

stated does not appear to be disputed by counsel for plaintiff here, but he claims that the rule is not applicable to the dismissal provided for by subdivision 1 of section 581, which, by the express terms of the subdivision, is to be made "by the plaintiff himself." His claim is that this use of the word "himself" means that such dismissal must be made by the plaintiff in his own proper person. If this construction is to be given to the language, a dismissal under subdivision 1 of section 581 of the Code of Civil Procedure could not be made in the manner in which such dismissals are ordinarily made,—viz. through the attorney,—but would in all cases be required to be made by the plaintiff in his own proper person. Such certainly has never been understood to be the law, and the language used, when considered in connection with the remainder of the section, is not reasonably susceptible of such a construction. The words relied on, which were a part of the section on the same subject in the old Practice Act, and which have always been a part of this subdivision of section 581 of the Code of Civil Procedure, were used simply to distinguish the dismissal therein provided for as one that was to be made by the action of the plaintiff alone, without any concurrence of the other party or the court, while the dismissals provided for by other subdivisions of the same section could be made by a party only upon the written consent of the other party, or by the court upon motion of a party or upon its own motion. So far as this question is concerned, the words used in subdivision 1 of section 581 of the Code of Civil Procedure have no different meaning from the words "by either party" upon the written consent "of the other" in subdivision 2 of the same section, as to which it was held in *Board of Commissioners v. Younger*, 29 Cal. 147, [87 Am. Dec. 164], that the consent must be signed by the attorney of record where there is such an attorney.

To accomplish the effect given by the decision in *Hopkins v. Superior Court*, 136 Cal. 552, [69 Pac. 299], to a written request for dismissal under subdivision 1 of section 581 of the Code of Civil Procedure, the case must be brought squarely within the terms of that subdivision, and to do this the request for dismissal must, under the authorities cited, be signed by the attorney of record for plaintiff, if there be such an attorney. Otherwise, the clerk is not authorized to recognize the

same as a discontinuance of the action, or to make entry of dismissal in his register, and the jurisdiction of the court over the cause is not impaired.

The mere making of the subsequent motion by the attorneys for plaintiff for a dismissal in open court on July 18, 1906, was not a dismissal under subdivision 1 of section 581 of the Code of Civil Procedure, or in the manner or form provided by that subdivision, and in no degree impaired the jurisdiction of the court over the cause. Whether or not the court should grant that motion in the face of the showing in opposition made by the parties beneficially interested in the maintenance of the action, and for whom plaintiff had commenced and was maintaining the action solely as a trustee, is a question it is not necessary here to decide. That motion is pending undetermined. Its pendency does not affect the jurisdiction, and we must now assume that it will be correctly determined.

It was further urged on the application for a writ of prohibition that under the circumstances alleged to have been shown to the superior court of Lassen County on the motion to dismiss made July 18, 1906, said court is without jurisdiction to grant or maintain an injunction enjoining plaintiff here from using the railroad-crossing situate in Plumas County. As already stated, the motion of July 18, 1906, has only been partially heard and is now pending undetermined. According to the allegations of the answer, pending its determination, the preliminary injunction issued in the action has been and is now suspended, under the terms of an order of the superior court of Lassen County. Under such circumstances, we cannot now assume that the superior court will not in determining said motion grant plaintiff here all the relief to which it is legally entitled, and in accord with our settled rule of practice we should decline to restrain the court below from proceeding, in advance of the ruling of such court on said motion. (See *Havemeyer v. Superior Court*, 84 Cal. 327, 403, [18 Am. St. Rep. 192, 24 Pac. 121].)

The alternative writ of prohibition heretofore issued is discharged and this proceeding dismissed.

McFarland, J., Shaw, J., Sloss, J., Lorigan, J., and Henshaw, J., concurred.

[S. F. No. 3509. In Bank.—January 3, 1907.]

UNION COLLECTION COMPANY, Appellant, v. A. E.
BUCKMAN, Respondent.

PROMISSORY NOTES—ILLEGAL CONSIDERATION—GAMBLING DEBT—NON-NEGOTIABILITY — DEFENSE AGAINST PURCHASER.—Promissory notes given solely to evidence an alleged indebtedness for money lost by the payor to the payee at a gambling game in a gambling-house are based upon an immoral and illegal consideration; and where they are non-negotiable, neither the payee nor any subsequent purchaser can recover upon the notes.

ID.—NEGOTIABLE NOTES—PRIMA FACIE EVIDENCE OF NOTICE—BURDEN OF PROOF—FINDING.—Even where notes are negotiable, proof that they are based upon an illegal consideration makes out a *prima facie* case of notice of the illegality to a purchaser thereof; and the burden of proof that he took without notice and for value before maturity is thrown upon him; and in the absence of such proof the finding must be that a plaintiff purchaser is not a holder without notice and for value.

ID.—RENEWAL NOTES—ILLEGAL.—Any renewal notes given in place of the original notes based upon an illegal consideration are affected with the same illegality. Merely repeating a promise based on an illegal consideration cannot give it validity.

ID.—COMPROMISE OF ILLEGAL NOTES.—Whatever may be the rule as to the effect of compromise of a doubtful claim, it can have no application when the claim involved in the compromise is wholly based upon an unlawful consideration, as distinguished merely from an insufficient consideration.

ID.—PROVINCE OF COURT TO WITHHOLD RELIEF—PUBLIC POLICY—CONSENT OF PARTIES IMMATERIAL.—The rule that the courts will not entertain any action in affirmance of an illegal contract is not based upon any consideration for the party against whom the relief is sought, but upon considerations of sound public policy; and notwithstanding his express consent that the court may enforce such illegal contract, if the illegality appears, the court will *sua sponte* withhold all relief. No action of the parties, nor of their assignees, can so validate an illegal contract as to justify the court in enforcing it where its illegality is manifest.

ID.—IMMATERIAL OMISSION IN FINDINGS.—Where, under the findings made in reference to the illegality of the consideration, the judgment for the defendant is supported, the failure to find upon other affirmative defenses in the answer is immaterial.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

J. S. Reid, for Appellant.

William H. Chapman, and E. G. Knapp, for Respondent.

ANGELLOTTI, J.—This action was brought upon two certain instruments in writing, whereby defendant agreed to pay to one Reid, plaintiff's assignor, four hundred and ten dollars and interest. Judgment went for defendant, and plaintiff appeals therefrom, and from an order denying its motion for a new trial.

Defendant in his answer admitted the execution of the instruments, but alleged that they were given without any consideration whatever, and solely for the purpose of evidencing an alleged indebtedness for money lost to one McMahon at a gambling game, for which alleged indebtedness he had given notes to McMahon, which had been transferred to Reid, and in part renewal of which he had executed the instruments in suit. He further alleged that Reid took and held the McMahon notes with full notice of the circumstances under which they were given, and that plaintiff here had the same notice.

Upon the trial, in support of this defense and in response to the *prima facie* case made by plaintiff, the following facts were shown over the objection and exception of plaintiff:—

Defendant, at a gambling-house in San Francisco and in a gambling game participated in by McMahon, who was a winner therein, lost some thirteen hundred dollars, for which amount he then and there, at McMahon's request, gave to McMahon three promissory notes, which notes were non-negotiable by reason of the presence in each of a stipulation for attorney fees in the event of suit. The evidence is sufficient to support the conclusion of the trial court that the original alleged indebtedness to McMahon was for money lost by defendant at this game and won by McMahon. There was no attempt whatever on the part of plaintiff to rebut the evidence of defendant upon this proposition. These notes were transferred to Reid for collection. Reid testified that he did not represent McMahon, but some other undisclosed person who was the equitable owner of the notes, but this we regard as immaterial. Reid subsequently brought suit upon one of

these notes for five hundred dollars. While this action was pending and ready for trial, defendant claiming that the note therein in suit and the other two notes were given solely to settle a gambling debt, an agreement was entered into between defendant and Reid, whereunder a dismissal of the suit was had and the three notes canceled in consideration of the giving of four notes for two hundred dollars each and interest by defendant to Reid. These notes were also non-negotiable. Upon these notes one hundred dollars only has been paid. Subsequently Reid brought another action upon two of these notes, and this action being at issue and ready for trial, and the defendant pleading therein want of consideration, in consideration of the dropping of the case from the calendar and its indefinite continuance, and ultimate final dismissal, in the event that defendant performed his part of the agreement, defendant executed the instruments in suit, which were also non-negotiable in form, and paid the jury costs. He also, in writing, purported to waive all defenses he might have to the claim of plaintiff, and to ratify the notes he had given.

The findings of the court were in accord with the allegations of the answer.

The questions raised on this appeal are presented by exceptions to the rulings of the trial court in admitting evidence as to the validity of the original notes, and by attacks on certain findings of the court on the ground of insufficiency of evidence to sustain them.

As already stated, the evidence sufficiently supports the conclusion of the trial court that the original notes were given to McMahon by defendant solely to evidence an alleged indebtedness for money lost by defendant to McMahon at a gambling game in a gambling-house. At the outset, therefore, it may be stated that it is clear that under the settled law of this state the consideration for such notes was *contra bonos mores* and unlawful (Civ. Code, secs. 1607, 1667), and that McMahon could not have recovered thereon. (*Bryant v. Mead*, 1 Cal. 441; *Gahan v. Neville*, 2 Cal. 81; *Carrier v. Brannan*, 3 Cal. 328; *Fuller v. Hutchings*, 10 Cal. 523, [70 Am. Dec. 746]; *Hill v. Kidd*, 43 Cal. 615; *Gridley v. Dorn*, 57 Cal. 78, [40 Am. Rep. 110].)

It is also plain that any assignee of McMahon of said notes could occupy no better position in a suit on the same than

McMahon himself. The notes being non-negotiable, any defense available against McMahon would have been available against any assignee or person claiming under McMahon. Such a contract on the part of the loser to pay the amount of his losses at a gambling game could only be enforced if negotiable in form, and then only by an innocent purchaser before maturity for value.

It is also well settled that even in the case of negotiable paper, where an action is brought by a subsequent holder, when it is shown that the same was obtained from the maker by fraud or duress, or that the consideration therefor was illegal, a *prima facie* case of notice to such holder is made out, and the burden of proving that he took without notice before maturity and for value is thrown upon him. (*Fuller v. Hutchings*, 10 Cal. 523, [70 Am. Dec. 746]; *Graham v. Larimer*, 83 Cal. 173, 177, [23 Pac. 286]; *Jordan v. Grover*, 99 Cal. 194, [33 Pac. 889]; *Shain v. Goodwin*, 46 Fed. 564. See, also, *Perkins v. Prout*, 47 N. H. 387; 93 Am. Dec. 449 and note.) It was said in *Graham v. Larimer*, 83 Cal. 173, 177, [23 Pac. 286], quoting from Parsons on Notes and Bills, that the reason for this rule is that the presumption is that the original party who has obtained such an instrument, and could not recover upon it, will part with it for the purpose of enabling some third party to recover upon it for his benefit, and, quoting from Lord Campbell, that when the defendant has proved fraud or illegality in the original holder, he has raised a *prima facie* presumption that the plaintiff is agent for that holder. In the absence of such rebutting evidence, the finding must be that the plaintiff in such an action is not a holder without notice and for value.

From what has been said, it is plain that, the illegal consideration being made to appear, a recovery on the original notes could not have been had in an action brought by McMahon, or Reid, or Reid's undisclosed equitable owner, or this plaintiff, and that any action thereon would have been without any legal foundation whatever. The same thing is necessarily true as to any notes given solely in renewal or in place of such original notes. Merely repeating a promise based on an illegal consideration cannot give it validity.

Plaintiff, however, relies upon the contention that the compromises of the prior proceedings brought against defend-

ant constituted a sufficient legal consideration for the instruments in suit, and barred all inquiry here as to the nature of the original transaction between defendant and McMahon.

It cannot, of course, be successfully disputed, that the compromise of a doubtful claim asserted and maintained in good faith constitutes a sufficient consideration for a new promise, even though it may ultimately be found that the claimant could not have prevailed. This is true whether the claim be in suit or not, but the rule is specially applicable where legal proceedings to enforce the asserted claim have been commenced and are pending and the proceedings are discontinued in pursuance of such compromise. (See *Spielberger v. Thompson*, 131 Cal. 55, [63 Pac. 132, 678]; *McClure v. McClure*, 100 Cal. 339, [34 Pac. 822]; *Kohrbacher v. Aitkin*, 145 Cal. 485, [78 Pac. 1054].) As to the effect of a compromise of a pending action, some general language of such nature has been used by some text-writers and courts as would, taken alone, warrant the contention of plaintiff that the compromise of the action in any case constitutes a sufficient consideration for a new promise and is a bar to all inquiry as to the merits of the original claim. (See Beach on Modern Law of Contracts, sec. 177.) Such, undoubtedly, should ordinarily be the effect of a compromise agreement made in good faith of a claim honestly asserted, for it is the policy of the law to discourage litigation and allow the parties to settle their *bona fide* disputes amicably. An examination of the authorities, however, discloses the fact that it has generally been recognized that to make a compromise of a claim, even though the same be in suit, sufficient to constitute a consideration for a new promise, the claim must not be wholly without foundation and known to the claimant to be so. (See 6 Am. & Eng. Ency. of Law, 2d ed., 714; 8 Cyc. 503, 505, 507, 509; 9 Cyc. 346; Beach on Modern Law of Contracts, sec. 176; *Emery v. Royal*, 117 Ind. 299, [20 N. E. 150]; *Pitkins v. Noyes*, 48 N. H. 294, [97 Am. Dec. 615, 2 Am. Rep. 218]; *Cruetz v. Hill*, 89 Ky. 429, [12 S. W. 626]; *Everingham v. Meighan*, 55 Wis. 354, [13 N. W. 269]; *Grandin v. Grandin*, 49 N. J. L. 510, [60 Am. Rep. 642, 9 Atl. 756]; *Gould v. Armstrong*, 2 Hall, 290, 294.) An examination of the cases cited by Mr. Beach in support of the rule stated by him in section 177 of his Modern Law of Contracts shows that in many of those cases

the courts were careful to state that there was no fraud or want of good faith on the part of the plaintiff in the prosecution of the original action which was compromised, while in the other cases the statement sustaining the literal text was purely *obiter*. In *McClure v. McClure*, 100 Cal. 339, [34 Pac. 822], this court quoted approvingly from Wharton on Contracts, section 533, as follows: "As has been incidentally noticed, a promise to compromise a claim utterly unfounded will not be regarded as a valid consideration. . . . It is otherwise when a suit is brought *bona fide* on probable cause; and a promise to compromise such suit is a valid consideration, even though the suit should be held to be unfounded."

But whatever may be the law as to cases involving no question of illegality, it is very clear that the rule contended for by plaintiff as to the effect of a compromise of an action can have no application where the claim involved therein was wholly based upon an unlawful, as distinguished from a merely insufficient, consideration.

There is no better-settled rule of law than the one to the effect that the courts will not entertain any action in affirmation of an illegal contract. As was said in *Hill v. Kidd*, 43 Cal. 615, "It is equally well settled that no action in affirmation of an illegal contract can be maintained. When parties make such contracts they must rely upon the good faith of those with whom they deal for their performance, and that failing they are denied all redress." (See note to *Chateau v. Singla*, 114 Cal. 91, in 55 Am. St. Rep. 66.) This universally acknowledged rule is not based upon any consideration for the party against whom the relief is sought, and who will be benefited by the refusal of the court to grant the same, but upon considerations of sound public policy. As said in *Kreamer v. Earl*, 91 Cal. 112, 118, [27 Pac. 735], "it is not for the sake of the party who is benefited by the intervention, but for the sake of the law itself," that a court refuses to allow the law and the machinery of the courts to be made use of for the enforcement of illegal contracts, and leaves the parties precisely where it finds them, under the rule expressed in the maxim, *Ex turpi causa non oritur actio*. It is, therefore, settled that the failure of the party against whom such relief is sought to make objection upon the ground of illegality, or the waiver of such objection by him, or even his express

consent that the court may enforce such illegal contract, will not justify a court in enforcing the same. The illegality appearing, the court will *sua sponte* withhold all relief. (See *Kreamer v. Earl*, 91 Cal. 112, 118, [27 Pac. 735]; *Ball v. Putnam*, 123 Cal. 134, 140, [55 Pac. 773]; 9 Cyc. 550.) In *Ball v. Putnam* this court, after saying that there was evidence tending to show that the contract which lay at the bottom of all the transactions between the parties was a contract void as against public policy, said: "Enough appears to call for a rigid inquiry by the trial judge, and if, after such inquiry, the evidence elicited leads him to believe that such is the fact, he will withhold all relief in this action, for a contract which is against public policy, good morals, or the express mandate of the law cannot be made the basis of any action, legal or equitable. Neither the silence nor consent of the parties to it justifies the court in retaining jurisdiction of such an action."

It would seem to necessarily be the case under this well-settled rule that no action of the parties or their assignees can so validate an illegal contract as to justify a court in enforcing it where its illegality appears. An attempted compromise of a claim based on such a contract, whether before or after institution of action thereon, would be simply an act of the parties looking to the complete or partial ratification of the illegal contract, and which could in no way affect the power of the court to refuse to allow itself to be used as the instrument for its enforcement. We have been unable to find any case holding that a compromise of a claim based on such a contract is supported by a legal consideration and will be enforced by the courts, and it appears to us that any such holding would be in defiance of the well-settled rule under discussion and contrary to every consideration of public policy. It would furnish an easy method by which the parties to an illegal contract might by their mere stipulation validate the same, and make it compulsory upon the courts to thereafter enforce it, although its illegality was clearly made to appear. This cannot be the law. A court will not thus allow itself to be made, as has been said, "the handmaid of iniquity."

It was held in *Everingham v. Meighan*, 55 Wis. 354, [13 N. W. 269], that no compromise by the parties of differences

in respect to clearly illegal contracts and transactions can purge them and produce a valid claim. The contract there involved was a gambling contract. The case of *Reed v. Brewer* (Tex. Civ. App.), 36 S. W. 99, is squarely in point. The action there was upon notes given in settlement of a suit brought upon an illegal contract, and it was held that the agreement of compromise did not so change and purify the transaction as to relieve it of its vice and illegality. Quoting Bishop on Contracts, the court said: "A contract executed in consideration of a previous illegal one, or in compromise of differences growing out of it, is like that whereon it rests, illegal and incapable of being enforced." These decisions appear to us to be in accord with the rule under discussion, and, as already said, we have found no case holding to the contrary.

Under the rule which we hold applicable here, it would seem that the question as to whether Reid or the "undisclosed equitable owner," whom he testified that he represented, had actual notice of the circumstances under which the McMahon notes were given, was entirely immaterial in this controversy. Those notes, as already stated, were not negotiable, and the successors of McMahon took them subject to any objection that might be made to their validity. They stand here in the shoes of McMahon, and any answer to a claim based thereon that would have been available against him is available against them. This includes not only such defenses as might seasonably be urged by the maker of the notes, but also such objections to the enforcement of the claim on the ground of illegality as might appear to the courts when an attempt was made to enforce it. They took the notes with knowledge, conclusively imputed to them that if they were ultimately found to be based upon an illegal consideration, there could be no recovery thereon, and that the maker of the notes could not by any agreement of ratification or compromise render them or instruments given in place thereof enforceable by the courts, when their illegality should be made to appear. The defense of want of notice of the illegality of a contract is available only where the contract is a negotiable instrument in the hands of one who has acquired it for value before maturity and in the ordinary course of business. (See *Haight v. Joyce*, 2 Cal. 64, [56 Am. Dec. 311]; *Fuller v. Hutchings*, 10 Cal. 523, [70 Am. Dec. 746]; *Eames v. Crosier*, 101 Cal.

260, [35 Pac. 873].) It is therefore unnecessary to determine whether the evidence shows that Reid had actual notice of the invalidity of the notes at the time they were transferred to him. It may, however, be stated that the evidence was certainly sufficient to sustain a finding that he had full notice of the claim of defendant in this regard prior to the first attempt at compromise, and that he made the compromise with knowledge imputed to him of the fact that the original notes were based on an unlawful consideration.

Under the views we have expressed, the trial court did not err in admitting the testimony objected to, and the evidence was sufficient to support the findings in so far as the same are essential to the validity of the judgment.

Complaint is made by plaintiff that the trial court failed to find upon certain affirmative defenses tendered by the answer,—viz. one of former action pending, and another of a previous order or judgment decreeing the instruments in suit to be void and of no effect. The failure to find on the issues thus tendered could not prejudicially affect plaintiff here, in view of the other findings which make it essential that judgment should go against him, even had findings been made in his favor on these issues.

The judgment and order are affirmed.

Shaw, J., Henshaw, J., Lorigan, J., McFarland, J., and Beatty, C. J., concurred.

[S. F. No. 4087. In Bank.—January 4, 1907.]

CHARLES A. WARREN, Appellant, v. CITY AND
COUNTY OF SAN FRANCISCO, Respondent.

TAXATION—VOID ASSESSMENT AND SALE OF STREET.—An assessment of a portion of a public street is void, and creates no lien upon the land assessed; nor can a sale and conveyance by the tax-collector to the state for a delinquent tax thereupon transfer title to the state, nor would a grantee from the state acquire any right in the land, or by reason of such sale be authorized to close the street from use by the public.

ID.—PAYMENT BY LOT-OWNER TO PREVENT SALE—PROTEST—CODE PROVISION INAPPLICABLE.—A payment by a lot-owner abutting on the street but not on the part of the street assessed, made under protest, to prevent a sale of such part of the street, is not rendered involuntary by the protest under section 3819 of the Political Code, which provides merely that taxes paid under an illegal assessment by the owner of land under protest shall not be regarded as voluntary, and has no application to a payment by one who is not the owner of nor interested in the land assessed. The interest of the lot-owner in that part of the street was no different from that of any other proprietor whose lot bordered on any other part of the street.

ID.—VOLUNTARY PAYMENT WITH KNOWLEDGE OF FACTS—PRESUMPTION—ABSENCE OF COERCION—MONEY PAID NOT RECOVERABLE.—The payment of the money by such lot-owner into the city and county treasury under protest, to prevent such sale, made with full knowledge of the facts and with presumed knowledge that the sale was made without any authority and created no lien, was voluntary and without compulsion or coercion, or any duress or threatened exercise of power over his person or property; and the money so paid cannot be recovered back by action against the city and county.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

J. C. Bates, for Appellant.

Percy V. Long, City Attorney, William G. Burke, City Attorney, Luther Elkins, Assistant City Attorney, and A. S. Newburg, for Respondent.

THE COURT.—This action was brought to recover of defendant money paid it in redemption of a lot from the sale thereof to the city for delinquent taxes. The case was heard on appeal by the district court of appeal, first appellate district, and the judgment of the superior court affirmed. The application to have the cause heard by this court, after judgment of said district court of appeal, was pending, when a general order of April 23, 1906, granting provisionally all applications for rehearings, was made. Since then a reargument of the cause has been had in this court, and upon a consideration of the points involved we are satisfied that the

appeal was correctly decided by said district court of appeal. The opinion of that court in disposing of said appeal is as follows:—

“The plaintiff brought this action to recover from the city and county of San Francisco the money paid by him to redeem a certain lot of land from sale made to the state of California for delinquent taxes thereon. A demurrer to the complaint was sustained, and the plaintiff has appealed from the judgment of dismissal entered thereon.

“It is alleged in the complaint that the tract of land so sold to the state, and for the redemption of which the plaintiff paid the money into the city treasury, was at the time of said sale, and had been for many years prior thereto, and is now, a portion of Caroline Street, an open public street duly dedicated to public use, and that notwithstanding it had been so opened, used, and dedicated as a public street, the city and county assessor did, in the year 1896, unlawfully and in disregard of the law in such cases, assess for state and county taxes a portion of said street one hundred feet in extent southeasterly from its terminus at the southerly line of Howard Street, as if it were private property and not a public street; that on the third day of July, 1897, said portion of said street was sold to the state of California to pay said unlawful assessment for taxes against it; that thereafter the tax-collector for San Francisco, pursuant to directions from the state controller, advertised said parcel of land for sale; that in order to prevent said sale, and while said tax-collector was threatening to sell the same, the plaintiff paid to the treasurer of said city and county the sum of \$805.53 to redeem said land from the said illegal assessment, and to prevent and stop the said sale thereof; that he was compelled to pay the same to prevent said street from being closed and its use to him destroyed for two or more years, and that he paid the same under coercion and protest in writing; that the plaintiff was at the time of said payment, and had been for many years, the owner of a lot of land fronting on said Caroline Street, but not abutting on that portion thereof so assessed and sold to the state; and that his said lot would be greatly impaired in value if said portion of Caroline Street should be closed and he be thereby deprived of egress and ingress to and from his lot through the same.

"The plaintiff is not proceeding under section 3804 of the Political Code, as he did not obtain an order from the board of supervisors that the money paid by him to the treasurer be refunded. Section 3819 of the Political Code has no application. That section provides that the 'owner' of any property assessed, who may claim that the assessment is void, may pay his tax under protest, specifying the grounds of the protest; and that when so paid under protest the payment shall not be regarded as voluntary. The plaintiff herein was not the 'owner' of the land assessed nor of any land bordering or adjoining that portion of Caroline Street, and had no opportunity of egress from his lot upon that portion of the street assessed, and his interest in that portion of the street was no different from that of any other proprietor whose lot bordered upon any other portion of the street. (See *Symons v. San Francisco*, 115 Cal. 555, [42 Pac. 913, 47 Pac. 453].)

"The payment of the money by the plaintiff, with full knowledge of the facts under which it was made, was voluntary, and under well-established rules cannot be recovered. The assessment by the city and county assessor of a portion of an open public street was made, as is stated in the complaint, 'unlawfully and in disregard of the law in such cases,' and the plaintiff is presumed to have known that it was so made without any authority and created no lien upon the land so assessed. The sale and conveyance to the state for a delinquent tax upon such assessment transferred no title to the state, and the threatened sale by the tax-collector in no respect affected the rights of the public to the use of the street or to have it remain open and unobstructed. A grantee from the state under such sale by the tax-collector would acquire no right in the land, or, by reason of such sale, be authorized to close the street from use by the public. There was therefore no compulsion or coercion upon the plaintiff, or any duress or threatened exercise of power over his person or property, and his protest did not have the effect to take from the payment its voluntary character. (*Brumagim v. Tillinghast*, 18 Cal. 265, [79 Am. Dec. 176]; *Phelan v. San Francisco*, 120 Cal. 1, [52 Pac. 38].) The demurrer to the complaint was therefore properly sustained. The judgment is affirmed."

We are satisfied with the foregoing reasoning of the district court of appeal in the matter and with the conclusion reached by it.

The judgment is affirmed.

[S. F. No. 3925. Department One.—January 7, 1907.]

FREDERICK BROWN, Appellant, v. JAMES REA, SAN JOSE AND SANTA CLARA RAILROAD COMPANY, and GEORGE W. ELDER, Respondents.

PUBLIC NUISANCE—RIGHT OF PRIVATE ACTION.—A public nuisance may inflict upon an individual such peculiar injury, different in kind, and not merely in degree, from that suffered by the general public, as to entitle him to maintain a separate action to abate it, and to recover damages therefor.

ID.—OBSTRUCTION TO HIGHWAY—RAILROAD—RIGHTS OF ABUTTING OWNERS.—Ordinarily an unauthorized and illegal obstruction to a highway is a public nuisance; and it may constitute a private nuisance as well to an abutting owner, if it obstructs his easement to a right of access from his land to the highway and from the highway to his land. But the operation of a railroad upon a street is not as to abutting owners *per se* a nuisance. It may or may not be a nuisance, according to the manner of its construction and operation, and to surrounding circumstances.

ID.—INJUNCTION NOT SUPPORTED—MERE OPERATION OF RAILROAD.—The mere fact that railroad-cars are to be operated in a street adjoining plaintiff's property does not show any such peculiar injury to him as will justify an injunction restraining the construction and operation of the railroad.

ID.—PLEADING—INSUFFICIENT COMPLAINT.—A complaint seeking to enjoin a railroad as an obstruction to the right of access of the plaintiff, which does not set forth any facts which show that his right of access has been obstructed by the work already done, or will be obstructed or impaired by the work to be done, but merely alleges his opinions and conclusions on that subject; and alleges that the defendants are constructing and intend to operate a four-track railroad upon the street in front of his premises, without stating the width of the street or the location or manner of construction of the ties and rails, or how often or in what manner cars or motors will be run upon them, or whether it will be a steam or a street railroad, does not state a cause of action justifying an injunction restraining its construction and operation.

ID.—DAMAGES NOT SUSTAINED.—A complaint, whether seeking damages or an injunction, which fails to show some actual or threatened injury to a private property right of the plaintiff is insufficient to justify either. The allegation that the proposed work will “greatly lessen and diminish the value” of the property is too indefinite; and an averment that defendants have commenced excavating the street, and made a deep and wide trench therein “which greatly obstructs and impedes traffic on the street,” is also too indefinite; and where there is no averment that the trench is in front of plaintiff’s premises, or that it obstructs plaintiff’s ingress and egress, the complaint fails to show a cause of action, for damages as well as for an injunction.

APPEAL from a judgment of the Superior Court of Santa Clara County. Hiram D. Tuttle, Judge.

The facts are stated in the opinion of the court.

William P. Veuve, for Appellant.

Louis O’Neal, and Owen D. Richardson, for Respondents.

SLOSS, J.—The plaintiff filed a complaint alleging the following facts: That he is the owner of a lot of land in the city of San Jose, having a frontage of 88.6 feet on North Market Street, a public street of the city; that upon this lot there is a building in which plaintiff is carrying on a wholesale grain and produce business; that in the conduct of said business it is necessary to use large drays and wagons to carry the merchandise to and from said premises, and that said trucks and wagons need free and unobstructed access and ingress in and to said premises from Market Street. The complaint alleges that the defendants wrongfully and without right threaten and intend to enter Market Street and the part thereof immediately in front of plaintiff’s premises for the purpose of laying ties and rails thereon in the construction of two railroads, each of which will have double tracks, and that the defendants have actually commenced the digging and excavating of the street, and have already made a deep and wide trench therein which greatly obstructs and impedes the traffic on said street, and that the defendants threaten and intend to continue to tear and excavate the street and the part thereof immediately in front of plaintiff’s premises, to lay

ties and rails thereon, and, when the same are laid, to permanently run cars and motors thereon; that the occupation and use of said street and the part thereof adjoining plaintiff's premises and business house will irreparably injure and damage plaintiff and will greatly endanger and obstruct the use of plaintiff's premises, and will particularly and irremediably impair the right and easement of access thereto and egress therefrom, and will greatly obstruct, hamper, and impede plaintiff in the carrying on of his business on said premises, and will greatly lessen the value thereof, and will irremediably impair and destroy plaintiff's rights in Market Street and his easement of access to and ingress in and to and egress from his said premises; that plaintiff has already suffered damage by reason of the premises in the sum of one thousand dollars. The prayer of the complaint is for said sum of one thousand dollars and for an injunction restraining the defendants from digging and making any excavation in Market Street, or laying ties and rails thereon, or running cars thereon for any purpose.

The railroad company and the defendant Elder demurred on the ground that the complaint failed to state facts sufficient to constitute a cause of action. Defendant Rea demurred upon the same ground, and further specified certain particulars in which, as he claimed, the complaint was uncertain.

The demurrers being submitted to the court, an order was made sustaining all of them, with leave to the plaintiff to amend within ten days. No amendment having been made within the time allowed, the defendants had judgment against the plaintiff for their costs. From this judgment the plaintiff appeals.

It is unnecessary to consider any of the special grounds of demurrer urged by the defendant Rea, since we are satisfied that the general demurrers were properly sustained. Apparently the plaintiff attempted in his complaint to allege facts showing a threatened nuisance, the maintenance of which would be especially injurious to him. A nuisance is defined in the Civil Code (sec. 3479) as "anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully

obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway." Section 3480 of the Civil Code defines a public nuisance as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Generally speaking, a public nuisance does not furnish ground for action by a private person, but such public nuisance may inflict upon an individual such peculiar injury as to entitle him to maintain a separate action for its abatement, or to recover damages therefor. (Civ. Code, sec. 3493.) The injury to the individual must, however, be different in kind and not merely in degree from that suffered by the general public. (*Aram v. Schallenberger*, 41 Cal. 449; *Bigley v. Nunan*, 53 Cal. 403; *Hogan v. Central Pacific R. R. Co.*, 71 Cal. 87, [11 Pac. 876].) Ordinarily, an obstruction to a highway, if unauthorized and illegal, is a public nuisance. The injury is to the right to travel upon the highway, which right resides in the public generally. Such obstruction may, however, constitute a private nuisance as well. Every owner of land abutting upon a highway has a right of access from his land to the highway and from the highway to his land. This right of access is an easement, and an obstruction to the highway which at the same time obstructs this easement is a peculiar injury to the abutting landowner and gives him a cause of action. (*Hargro v. Hodgdon*, 89 Cal. 623, [26 Pac. 1106].)

The plaintiff undoubtedly sought to allege such an obstruction of this easement as would constitute a peculiar injury to him. But in the complaint he does not set forth any facts which show that this right of access has been obstructed by the work already done, or will be obstructed or impaired by the work to be done. It is true that he asserts repeatedly that the construction and operation of the railroad will have such effect, but this is merely an allegation of his conclusions and opinions, and cannot be considered as stating a cause of action. The facts alleged are merely that the defendants are constructing and intend to operate a four-track railroad upon the street in front of his premises. These facts alone do not make it appear to the court that the plaintiff's right of

passage between the street and his premises will be in any degree affected. The operation of a railroad upon a street is not, as to abutting owners, a nuisance *per se*. It may or may not be a nuisance, according to the manner of its construction and operation and the surrounding circumstances. In the present case the complaint does not allege the width of the street, the location upon the street of the proposed ties or rails, whether or not the ties or rails when completed will project above the surface of the street, how often or in what manner cars or motors will be run upon the rails, or any circumstances showing anything more than that a railroad will be operated upon a street adjoining the plaintiff's premises. It is not even stated whether or not the proposed railroad is a street railroad. The mere fact that railroad-cars are to be operated on a street adjoining plaintiff's property does not show any such peculiar injury to him as will justify an injunction restraining the construction and operation of the railroad.

We do not overlook the consideration that, under the constitutional provision that "private property shall not be taken or damaged for public use without just compensation having first been made" (Const. Cal., art. I, sec. 14), damages may be recovered by an abutting owner for any public use of a street which damages his adjoining property, or his easement of access to and from the street. (*Eachus v. Los Angeles Ry. Co.*, 103 Cal. 614, [42 Am. St. Rep. 149, 37 Pac. 750]; *Kishlar v. Southern Pacific R. R. Co.*, 134 Cal. 636, [66 Pac. 848]; *St. Clair v. San Francisco etc. Ry. Co.*, 142 Cal. 647, [76 Pac. 485]; *Smith v. Southern Pacific R. R. Co.*, 146 Cal. 164, [106 Am. St. Rep. 17, 79 Pac. 868].) And, perhaps, a proposed use could be enjoined until the payment of the damage which would follow such use. But the complaint, whether seeking damages after the construction, or an injunction before, must show some actual or threatened injury to a private property right of the plaintiff, and this the present complaint fails to do. The allegation that the proposed work will "greatly lessen and diminish the value" of the property is, like other statements, a mere averment of opinion or conclusion too general and indefinite to afford a basis for relief by injunction.

So far as this is an action to recover damages for past

injury, the allegations of the complaint are open to the same criticism directed against the averments of threatened acts. All that is stated is that the defendants have already commenced digging and excavating the street, and "made a deep and wide trench therein, which greatly obstructs and impedes traffic on said street." There is no allegation that this trench is in the part of the street in front of the plaintiff's premises, nor is it averred, even by way of conclusion, that the trench obstructs the plaintiff's ingress to or egress from his premises. Even if the trench were shown to be immediately opposite plaintiff's property, its character and dimensions are not described. The words "wide and deep" convey no such definite idea as is required in a pleading of this character. Since the only fact alleged as a basis for the recovery of damages is the excavation of this trench, it follows that the complaint fails to show a cause of action for damages, as well as for an injunction.

There is abundant authority in support of the principal proposition discussed in this opinion,—i. e. that in an action to enjoin a nuisance there must be, not merely an allegation of the plaintiff's opinion or conclusion as to the effect of the proposed act, but a statement of facts from which the court may draw the conclusion that a nuisance will result. Some of the cases illustrating this rule are *Payne v. McKinley*, 54 Cal. 532; *Dunn v. City of Austin*, 11 S. W. (Tex.) 1125; *Bowen v. Mauzy*, 117 Ind. 258, [19 N. E. 526]; *Begein v. Anderson*, 28 Ind. 79; *Kingsbury v. Flowers*, 65 Ala. 479, [39 Am. Rep. 14]; *Adams v. Michael*, 38 Md. 123, [17 Am. Rep. 516]; *Thebaut v. Canova*, 11 Fla. 167; *Reynolds v. Presidio and Ferries Ry. Co.*, 1 Cal. App. 229, [81 Pac. 1118]. See, also, note to *Ryan v. Copes*, 73 Am. Dec. 106.

The judgment is affirmed.

Angellotti, J., and Shaw, J., concurred.

[S. F. No. 3786. Department Two.—January 7, 1907.]

FRED H. MEYER, Respondent, v. **JOHN F. O'ROURKE**,
Executor of Will of Patrick O'Rourke, Deceased, Ap-
pellant.

QUIETING TITLE—SUFFICIENCY OF COMPLAINT—OWNERSHIP IN FEE.—A complaint in an action to quiet title which alleges that "plaintiff now is, and for some time hitherto has been, the owner and in possession of" the land described, and that "defendant claims some title or interest therein, and has none," states a cause of action, and is to be construed as alleging "ownership in fee" in the plaintiff.

ID.—ISSUES—PLEA OF "OWNERSHIP IN FEE SIMPLE"—GENERAL FINDING FOR PLAINTIFF.—Where the answer took issue upon the complaint and pleaded "ownership in fee simple" in the estate of a deceased person, a general finding for plaintiff that "each and all of the allegations of plaintiff's complaint are true and are sustained by the evidence" is sufficient to support a judgment for the plaintiff, notwithstanding failure to find upon the plea of such ownership in fee simple.

ID.—COSTS — PERSONAL JUDGMENT AGAINST EXECUTOR — DISCRETION — UNNECESSARY FINDING.—The costs in an action to quiet title against an executor, which was contested by him, are an incident to a judgment for the plaintiff; and it was within the discretion of the court to award the costs against the executor personally, without any necessity of finding mismanagement or bad faith of the executor.

ID.—GENERAL RULE AS TO COSTS AGAINST EXECUTOR INDIVIDUALLY—APPLICATION TO PROBATE COURT.—In the absence of special statutes as to costs against an executor, the general rule is that costs should be imposed upon the executor individually, leaving him the right to seek an allowance for payment thereof from the probate court, which may allow it or not, according as his conduct in the suit may appear to it discreet or otherwise.

ID.—APPEAL BY EXECUTOR — CONSTITUTIONALITY OF STATUTE NOT INVOLVED—REMEDY BY INDIVIDUAL MOTION AND APPEAL.—Upon appeal by the executor as such from the costs awarded against him, the estate is not an aggrieved party entitled to raise the question of the constitutionality of section 1509 of the Code of Civil Procedure. In order to have his objection thereto considered, he should have connected himself individually with the proceedings by motion for relief from the costs, and appeal in his individual capacity as a party aggrieved.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.
CL Cal.—12

The facts are stated in the opinion of the court.

Robert P. Troy, for Appellant.

Vogelsang & Brown, and Bertin A. Weyl, for Respondent.

HENSHAW, J.—This was an action to quiet title, brought against John F. O'Rourke as executor of the last will of Patrick O'Rourke, deceased. The complaint alleged "that plaintiff now is, and for some time hitherto has been, the owner and in possession of that certain piece of land," describing it. The answer was denial, with an allegation "that the real property in said complaint described is owned in fee simple by the said estate of Patrick O'Rourke, deceased." After trial the court found that "each and all of the allegations of plaintiff's complaint are true and are sustained by the evidence." It is urged that the findings are insufficient to support the judgment, in that there is a failure to find upon the affirmative allegation of the answer that the estate of Patrick O'Rourke owned the property in fee simple. A complaint which alleges that plaintiff is the owner and in possession of certain lands, and that defendant claims an estate or interest therein, but has none, states a cause of action. (*Rough v. Simmons*, 65 Cal. 227, [3 Pac. 804].) The ownership and right of possession, as unqualifiedly averred in the complaint, is an allegation of ownership in fee. (Civ. Code, secs. 680, 761, 762.) The finding of the court, therefore, that all the allegations of the complaint are true, is sufficient to support the decree which was given in plaintiff's favor.

But the principal contention on this appeal is against the award of costs. The court awarded costs against John F. O'Rourke personally. The provisions of the Code of Civil Procedure bearing upon this are sections 1031 and 1509. Upon authority of former decisions of this court, construing and applying those sections,—viz. *Hicox v. Graham*, 6 Cal. 167, and *Stevens v. San Francisco etc. R. R. Co.*, 103 Cal. 252, [37 Pac. 146],—the order the court here made was within its discretion. Most of the matters presented against this award were urged in *Stevens v. San Francisco etc. R. R. Co.*, 103 Cal. 252, [37 Pac. 146], and must be taken to have been decided adversely to the present contention. The Stevens

case, however, having been tried before a jury, differs in that respect from the case at bar, which was tried by the court, and it is urged that there should have been a finding of the mismanagement and bad faith of the executor before costs could have been awarded against him personally. Costs, however, are but an incident of the judgment, and no finding was necessary. Appellant's argument against the constitutionality of section 1509 of the Code of Civil Procedure is the familiar one that he is a defendant in his representative capacity as executor; that an award of the costs against him personally deprives him of property without due process of law, in that he personally was not a party to the action, and that the section is unconstitutional in not conferring upon him process of law, and allowing him an opportunity to be heard in his individual capacity. The contention, however, so far as this case is concerned, proves too much. He appeals in his representative capacity, and upon his appeal seeks to have himself, in his individual capacity, relieved from this imposition of costs. Upon this appeal, therefore, as the executor of an estate, charged with its preservation and conservation, he occupies a position in hostility to it, in endeavoring to have the burden of the costs of litigation removed from his individual shoulders and cast upon the estate which he represents. So far as the estate is concerned, which alone he represents upon this appeal, the estate is not an aggrieved party. So far as he individually is concerned, if weight is to be accorded to his objections as to the constitutionality of the section, he should have connected himself with the proceedings in the trial court after the imposition of costs upon him individually, and so, in his proper and individual capacity as a party aggrieved, have come before this court for relief. It was perfectly proper for him in his individual capacity to have made appropriate motion in the court below, connecting him with the litigation, and seeking relief. (*McCarthy v. Speed*, 16 S. Dak. 584, [94 N. W. 411].) Moreover, if the appellant's views as to the unconstitutionality of section 1509 of the Code of Civil Procedure should be held valid, the same vice of want of notice inheres in section 1031 of the Code of Civil Procedure, with the result that we are left without a statute bearing upon the imposition of costs in case of the executor or administrator, excepting the general provision of

section 1022 of the Code of Civil Procedure. In such case the rule is well settled, and is indeed commended, that the costs should be imposed upon the executor individually, and not upon the estate, nor upon him in his representative capacity. There is left to him the right to seek an allowance from the estate in a proper case. If, however, the litigation has been unjust or ill-advised, then, to prevent the dissipation of estates at the hands of careless executors, the executor individually will be compelled to bear the burden. Thus says the supreme court of Massachusetts, in *Hardy v. Call*, 16 Mass. 530: "If the judgment for costs could be legally recovered against the goods and estates of testators and intestates, all such estates might go for the payment of costs in frivolous suits. Judgment, therefore, in every case commenced by an executor or administrator in which defendant becomes entitled to costs ought to be entered against such executor or administrator personally. After payment he may charge the amount in his account of administration, to be allowed or not as it may appear to the judge of the probate court that the suit was discreet or otherwise." (See, also, *Lynch v. Webster*, 17 R. I. 513, [23 Atl. 27]; *O'Hear v. Skeeles*, 22 Vt. 152; *Williamson v. Childress*, 26 Miss. 328; *Show v. Conway*, 7 Pa. St. 136.)

For the foregoing reasons the judgment appealed from is affirmed.

McFarland, J., and Lorigan, J., concurred.

[S. F. No. 3949. Department One.—January 7, 1907.]

JOHN A. BANZHAF et al., Respondents, v. EDWARD C. CHASE, Appellant.

INJUNCTION—FRAUDULENT DIVERSION OF BAKERS' BUSINESS—DAMAGE.

—Plaintiffs, whose bakery had been known as the "Old Homestead Bakery," and whose bread was stamped with the words "Old Homestead," the word "Old" being stamped above the word "Homestead," may enjoin the fraudulent diversion of their business by the defendant, who offered for sale bread stamped "New Homestead," of the same size and stamped in the same style as the loaves of the plaintiffs, with the fraudulent intent to injure and

divert the business of plaintiffs, and to deceive and mislead their previous purchasers and customers, and which had that effect, to plaintiffs' damage, for which judgment was given.

ID.—GIST OF ACTION—TRADEMARK NOT INVOLVED—FRAUDULENT APPROPRIATION OF TRADE.—The plaintiffs' right to recover in the action does not depend upon plaintiffs' right to the exclusive use of the words in question. The gist of the action is not the appropriation and use of another's trademark, but is based upon the fraudulent injury to and appropriation of another's trade.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Riordan & Lande, and James P. Sweeney, for Appellant.

Alexander & Church, for Respondents.

SHAW, J.—The plaintiffs were engaged in the business of baking and selling bread in the city of San Francisco. Their bakery had become known as the "Old Homestead Bakery," and they had been for a long time making and selling a certain kind of bread which they had designated as "Old Homestead" bread, which had become well known by that name and had acquired a reputation for its good quality, and by reason thereof it had an extensive sale in the city and county of San Francisco. The name "Old Homestead" was stamped upon each loaf of bread, the word "Old" being placed immediately over the word "Homestead." Because of its reputation under the designation aforesaid, the plaintiffs had enjoyed a good trade in this bread, and it had been a source of great profit to them.

The defendant, with the intent to injure and destroy the business of the plaintiffs, and to deceive the public and the buyers and consumers of plaintiffs' "Old Homestead" bread and to injure and defraud the plaintiffs, prepared and offered for sale an article of bread in loaves of a size similar to those of the plaintiffs, marked with the words "New Homestead," stamped into the loaves, with letters and words of the same style and size, and arranged in the same manner as the words "Old Homestead," in the loaves of bread made by the

plaintiffs. This bread was put upon the market by the defendant, and was of a character to deceive the buyers of bread and did mislead the previous purchasers and consumers of bread of plaintiffs' manufacture and induced them to buy that of the defendant instead of the plaintiffs, whereby the plaintiffs lost their trade and were damaged in an amount which the court below found to be \$765.

This action was begun to enjoin the defendant from making bread in imitation of the plaintiffs' bread and marking the same with the name "New Homestead," or "Homestead," or in any manner using the said words in connection with the sale of said bread to induce customers to buy the same, or from using any simulation of the plaintiffs' trademark aforesaid. The cause was tried by the court, findings were made in accordance with the allegations of the complaint, and judgment rendered accordingly. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The contention of the defendant is that the words "Old Homestead" are merely descriptive of the kind and quality of the bread; that they are an affirmation that the bread "is like that made in the old homestead of childhood's recollection," and that it is equally pure and simple as home-made bread; that they do not indicate origin or ownership; and hence, that any person is at liberty to use them, and that they cannot be adopted as a trademark and the right to their use acquired as the property of any person.

The words "Old Homestead," or "Homestead," may, and perhaps do, suggest that the bread on which they appear is asserted to be similar to that made in the ordinary old homestead. Whether this would indicate to any person that it is good bread or bad bread would depend on the recollections or knowledge of the particular person concerning the kind of bread made in the homestead of his experience, whether it was that of his childhood or of his adult years. But we may concede that the words are descriptive in character and relate to quality, and hence that, under section 991 of the Civil Code, they cannot be appropriated by any person as his own, so as to give him a right to prevent their use by another to his injury, regardless of the motives or purposes of the other in so using them.

The case of the plaintiffs does not depend on their right to the exclusive use of the words in question. It is based on fraud. It rests on the right of the plaintiffs to restrain the conduct of the defendant whereby he, in order to injure the plaintiffs and benefit himself, simulates the plaintiffs' goods, deceives the plaintiffs' patrons into the belief that his bread is that made by the plaintiffs, and thereby induces them to buy his own bread instead of the plaintiffs', thus, by fraud and deception, depriving the plaintiffs of the profits of such sales and appropriating the same to his own use. The right to prevent such an injury by injunction does not depend on the ownership by the plaintiffs of any particular word, phrase, or device, as a trademark. If the words in question constituted a trademark of the plaintiffs, as defined by law, and the defendant was using it to plaintiffs' injury, he would be restrained, although he were in entire ignorance of plaintiffs' prior use or right, and were using it in good faith, with good motives, with no intent to injure any person and no consciousness of such injury. But where one purposely imitates the goods, signs, or place of business of another, in order, by deceiving the other's patrons, to sell his own goods as the goods of the other, and thereby obtain for himself the profits which would otherwise go to the other, it is not necessary that the devices, words, or signs which are imitated shall constitute a trademark. The right of action in such a case arises from the fraudulent purpose and conduct of the defendant and the injury caused to the plaintiffs thereby, and it exists independently of the law regulating trademarks or of the ownership of such trademark by the plaintiffs. The gist of such an action is not the appropriation and use of another's trademark, but the fraudulent injury to, and appropriation of, another's trade.

This is well illustrated by the case of *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, [50 Am. St. Rep. 57, 42 Pac 142]. The plaintiff in that case was a corporation, and was engaged in business in a store upon which it had placed conspicuously the sign "Mechanical Store," which words were probably more descriptive of character and quality than the words "Old Homestead" in the case at bar. It had constructed the building in which it conducted the business in a peculiarly conspicuous style of architecture, and in that build-

ing and under that sign it had, for a long time, conducted the business, had acquired a wide reputation, and by honest dealing had obtained an extensive and profitable custom and valuable good-will. The defendant, for the fraudulent purpose of deceiving the public and the patrons of the plaintiff and appropriating to his own use the plaintiff's trade and profits, erected a building alongside that of plaintiffs, in the same style of architecture, so as to make it appear as a part of the plaintiff's store. He did not put up any sign whatever. In this adjoining building he kept for sale the same kind of goods as those dealt in by the plaintiff, and he did by these appearances deceive the public and prior patrons of the plaintiff, obtained their trade, and injured the plaintiff's business. It was held that this constituted an actionable wrong, regardless of the law of trademarks, or the imitation or use of any words which the plaintiff might claim as a trademark, and that an injunction was properly granted to prevent its further continuance. The case of *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, [78 Pac. 879], was of the same character and was decided upon the same principle.

The plaintiffs' case is, in its legal aspect, in all respects similar. It was said in the *Weinstock* case: "The fundamental principle underlying this entire branch of the law is, that no man has the right to sell his goods as the goods of a rival trader. . . . Upon what principle of law can a court of equity say, if you cheat and defraud your competitor in business by taking his name, the court will give relief against you, but if you cheat and defraud him by assuming a disguise of a different character your acts are beyond the law? Equity will not concern itself about the means by which fraud is done. It is the results arising from the means, it is the fraud itself, with which it deals. The foregoing principles of law do not apply alone to the protection of parties having trademarks and trade names. They reach away beyond that, and apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent." The same reasons apply with equal force to the case at bar and demonstrate conclusively that the plaintiffs are entitled to their injunction without regard to their ownership of any name as a trademark, and without inquiry into the

question raised by the defendant, whether or not the plaintiffs' name was properly registered as a trademark, or whether or not that registration was prior to the registration of the defendant.

In view of these conclusions it is unnecessary to notice further the other points raised.

The judgment and order are affirmed.

Sloss, J., and Angellotti, J., concurred.

[S. F. No. 3947. Department Two.—January 7, 1907.]

LOUIS O. LEVINSON, as Receiver, Appellant, v. J. BOAS,
Respondent.

PAWNBROKERS—DEFINITION.—To constitute a person a pawnbroker he must receive goods in pledge for loans of money at interest, and this must be his business, or a well-defined part thereof, as contradistinguished from a single transaction or occasional loans upon pledge.

ID.—NATURE AND LIMITS OF BUSINESS.—Although a pawnbroker limits his business, as such, to pledges of jewels and jewelry only, and, at the same time and place, conducts the business of a money-lender and requires the pledgor or pawnor of jewelry to execute a note or chattel mortgage upon jewelry transferred to his possession as security for loans of money thereon at interest, such facts do not render his business of receiving goods in pledge for such loans any the less that of a pawnbroker.

ID.—PLEDGE DISTINGUISHED FROM MORTGAGE.—Every contract by which the possession of personal property is transferred as security only is deemed a pledge; and the very fact that the pawnbroker took possession of the property as a pledge, and relied upon it as such, negatives the conception of a chattel mortgage.

ID.—BUSINESS A SUBJECT OF POLICE REGULATION.—The business of pawnbroker has always been the subject of police regulation for the benefit of the public, and it is unlawful if not conducted under the provisions, restrictions, and requirements of the law.

ID.—STATUTES FOR PROTECTION OF PUBLIC—VIOLATION—VOID CONTRACT.
—Wherever a statute is made for the protection of the public a contract in violation of its provisions is void.

ID.—VIOLATION OF PENAL LAWS REGULATING PAWNBROKERS—VOID PLEDGE—RECOVERY BY PLEDGOR.—Where a pawnbroker has violated

a city and county ordinance requiring a special license, and the provisions of the Penal Code on that subject, and also its penal provisions requiring him to make a complete registry of each transaction, and to deliver a written copy thereof to the pledgor, and forbidding loans on pledges in excess of ten per cent per annum, a contract of pledge in violation of such penal provisions is void, and the right of the pledgee to hold the property is lost, and the possession thereof may be recovered by the pledgor.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

M. B. Kellogg, Francis J. Heney, and C. A. S. Frost, for Appellant.

Lucius L. Solomons, for Respondent.

HENSHAW, J.—Plaintiff is the receiver of the insolvent copartnership of Schumacher & Co. While the firm of Schumacher & Co. was transacting its business as diamond and jewelry merchant one of the members of the firm, on behalf of the firm, at various times borrowed money from the defendant, pledging with him, as security for the loans, diamonds, and other jewels and articles of jewelry. After his appointment the receiver made demand upon defendant for a restoration and return of the pledges upon the ground that defendant was, and was acting as, a pawnbroker, and that because of his violations of the laws of the state and of the municipality of San Francisco in the conduct of his business as pawnbroker, the contracts were void. He therefore insisted that the pledges should be returned, and that defendant should be relegated to the position of a general creditor. Upon the refusal of defendant to accede to this demand, the receiver, with permission, brought suit. The suit was submitted for decision upon an agreed statement of facts, judgment passed for defendant, and the receiver appeals.

There being no controversy over the facts, the questions to be resolved are two. First, under the facts, was defendant a pawnbroker? Second, if a pawnbroker, did his unquestioned failure to comply with the statutes of the state and the ordi-

nances of San Francisco concerning pawnbrokers render void his contracts with Schumacher & Co.?

The word "pawnbroker" has been variously defined as "Any person whose business or occupation it is to take or receive, by way of pledge, pawn, or exchange, any goods, wares, or merchandise, or any kind of personal property whatever, as security for the payment of money loaned thereon." (Anderson's Law Dictionary, p. 759.) "One who makes a business of loaning money for interest, and receives personal property in security for the payment of the same." (English Law Dictionary, p. 607.) Or, again: "A pawn is a pledge to a pawnbroker, or person who keeps a shop for the purchase or sale of goods, and takes goods by way of security for money advanced thereon." (2 Raplajé & Lawrence's Dictionary, p. 940.) Our Penal Code (sec. 338) declares that "Every person who carries on the business of pawnbroker, by receiving goods in pledge for loans at any rate of interest above the rate of ten per cent per annum, except by authority of a license, is guilty of a misdemeanor." Under our law, therefore, one is a pawnbroker who carries on the business of receiving goods in pledge for loans, exacting an interest for those loans. If the rate of interest which he exacts exceeds ten per cent per annum, he is guilty of a misdemeanor if he conducts his business without first procuring a license so to do. Analyzing these definitions for the better understanding of the facts of this case which are to follow, it becomes apparent that, to constitute a person a pawnbroker, two requisites must be established. First, the person must receive goods in pledge for loans at a rate of interest, and, second, this must be his business, or a well-defined part of his business. A single transaction, or an occasional loan, would not establish that a person "carried on the business of pawnbroker." The stipulated facts as to defendant Boas may be summarized as follows: For more than thirty years last past he has maintained an office in the city and county of San Francisco for the transaction of business as a money-lender, and during all of said time was generally known to the public to be engaged in the business of lending money at his said office, upon mortgages on real estate, upon mortgages upon personal property, and upon assignments of life-insurance policies, and upon assignments of public warrants, and upon unsecured

notes from merchants reputed to be solvent; "*And as a part of his regular business was likewise generally known to the public to be there receiving jewelry and diamonds in pledge for loans, but not to be receiving any other class of goods, wares, or merchandise in pledge for loans.*" He paid a municipal license as a money-broker, and the sign above his place of business was either that of "Broker" or that of "Money-Broker," the sign being changed at various times. The respondent, neither at the time of the making of the loans, nor at any time, had a license to carry on or conduct the business of pawnbroker. The interest charged upon the loans exceeded ten per cent per annum. In making the loans the defendant relied solely upon the diamonds and jewelry so pledged with him as security for his debt, giving no weight or consideration whatever to the responsibility or non-responsibility of the copartnership firm of Schumacher & Co., or of either of its partners. Nor did he at the time of making the loans deliver to the partnership, or to any person on its behalf, a written copy of any entry made by him, or by any person in his behalf, in a register kept by him for that purpose, in the English, or in any other language, showing the date, duration, amount, or rate of interest of such loan, or showing an accurate description of the property so pledged, or showing the name or residence of the pledgor, as required by sections 338 and 339 of the Penal Code, and by certain municipal ordinances of the city and county of San Francisco. During all of this time the ordinances of the city and county of San Francisco required every keeper of a pawnbroker's shop or office to pay a license of thirty-one dollars per quarter, and required that every person engaged in the business of pawnbroker should keep a book in which should be entered at the time, in the English language, a true and accurate description of every article purchased by them, the name and residence of the vendor, the amount paid, the date and hour of purchase, and that such book should be exhibited upon request of any police officer of the permanent police force of the city. A violation of the terms of these ordinances was declared a misdemeanor, punishable by fine or imprisonment, or both. The city and county of San Francisco is given power to license and regulate pawnbrokers and to enact regulations to protect the public in dealing with them, to fix the

amount of the license and to impose fines, penalties, and forfeitures for the violation of such ordinances. (Pol. Code, sec. 4408, subds. 7, 8, 14, 15; Municipal Corporation Act, sec. 64, subd. 16; Stats. 1903, p. 666; Charter of the City and County of San Francisco, art. 2, chap. II, sec. 1, subds. 1, 16, art. 8, chap. IV, sec. 7.)

Under this state of the law and of the facts, was defendant a pawnbroker? Unhesitatingly it is answered that he was. He loaned money upon personal property pledged or pawned with him. He loaned this money upon the security of the pledge and pawn. He charged and collected upon these loans a high rate of interest, exceeding ten per cent per annum. He did all of these things continuously, and as a part of his regular business, at a fixed place of business, and the doing of these things—the carrying on of this business—was publicly known. That he limited his operations to certain classes of goods—namely, jewels and jewelry—does not militate against this conclusion. No one would hesitate to say that one who, as a regular business, received in pledge or pawn second-hand clothing, loaning money upon it at usurious rates of interest, was a pawnbroker. Yet the kinds of jewels, and, still more, the kinds of manufactured products known as jewelry, are vastly greater than the kinds of second-hand garments. So that the mere limiting of a dealer's sphere of operations to one or another of a particular class of goods is not at all the test of the character of his business.

Nor was his business any less that of a pawnbroker because at the same time and at the same place he conducted another business, or branches of his business, which were not of this character. A question identical in principle arose in *City of Los Angeles v. Loan etc. Co.*, 109 Cal. 396, [42 Pac. 149], where the defendant incorporated to do a trust and safe-deposit business and general banking business, had a savings department in which term savings deposits were received, and insisted that it was not taxable as a savings and loan corporation upon its term deposits. The trial court held that the deposits in question should not be assessed or treated as the property of the bank, but should be taxed with the safe deposits as ordinary commercial deposits. But this court held that the fact that the loan company was engaged in a general banking business, and a safe deposit business, in addition to

that of receiving savings deposits, did not exempt it from taxation as a savings bank upon its savings deposits. After setting forth that the corporation was conducting different kinds of business, it declared: "Our conclusion is . . . that as to the part of its business in controversy, it was *de facto* a savings corporation, and that the taxes in question were properly levied and assessed." When the making of such contracts of pledge or pawn becomes, in whole or in substance, part of the business of a man, his trade, his occupation, his means of obtaining a livelihood, or of making or adding to his fortune, he becomes a pawnbroker within the meaning of the law.

Nor was respondent the less a pawnbroker because he required the pledgor or pawnor to execute a promissory note or chattel mortgage in connection with the transaction. First, because it is admitted that reliance was placed upon the pledge, and, second, because the transactions, no matter what force the respondent may have thought attached to his notes and chattel mortgages, were, under our law, pledges, and nothing else. "Every contract by which the possession of personal property is transferred, as security only, is to be deemed a pledge." (Civ. Code, sec. 2987.) "Every transfer of an interest in property . . . made only as security for the performance of another act, is to be deemed a mortgage, except when, in the case of personal property, it is accompanied by actual change of possession, in which case it is to be deemed a pledge." (Civ. Code, sec. 2924.) The very fact that the respondent took possession of the property as a pledge, and relied upon his possession as a pledge, negatives the conception of a chattel mortgage. This precise question arose in Minnesota, and the same contention was made. It was disposed of by the supreme court of that state as follows: "We are also of the opinion that the evidence justified the trial court in finding that the defendant was conducting the business of pawnbroker. The evidence does not consist wholly, as counsel claims, of the two loans. There was evidence of admission of defendant, or her admitted general agent, that those loans were but samples of the kind of business which she was conducting, and that she was in the habit of lending money on watches, stocks, time-checks, or any other kind of security, but that she thought she was not required to

obtain a license because she issued no tickets, but took notes and chattel mortgages from the borrowers. In the instance referred to it was admitted that the articles taken as security were deposited with her, and the transactions were none the less a loan of money on pawn or pledge, because she took a chattel mortgage on the article deposited." (*City of St. Paul v. Lytle*, 69 Minn. 1, [71 N. W. 703].)

It being thus established that defendant was a pawnbroker, and it being admitted that in the conduct of his business he neither procured the license required by law, nor observed the regulations prescribed by the statutes of the state and by municipal ordinance for the conduct of the business of pawnbroker, there is presented the second question: What legal consequences followed this dereliction in the matter of these contracts of pledge? And first, as having to do with the question, it is to be noted that the business of a pawnbroker is one which has always been regarded as subject to police regulation for the benefit of the public, and to prevent frauds upon it. Thus, touching a pawnbroker act, the court of common pleas of England said: "It is quite evident that the statute was passed not only for the purpose of protecting the numerous parties who borrow money on small pledges, but also the public, against frauds committed on third persons, the real owners of goods, by pledging their property without their consent." (*Ferguson v. Norman*, 5 Bing. N. C. 76.) "The business [pawnbroker], therefore, comes expressly within the control of the police power of the state, and is properly subject to reasonable rules and regulations." (*Grand Rapids v. Brady*, 105 Mich. 670, [55 Am. St. Rep. 472, 64 N. W. 29].) And says the supreme court of Missouri: "The city may not only regulate, but suppress, pawnbrokers, or refuse to license such occupation altogether. No person has the right to follow such occupation within the limits of said city without first obtaining a license from its authorities for that purpose, which may be granted or withheld at pleasure. The business is a privilege, not a right, and he who avails himself of it and derives its benefits must bear its burdens and conform to the laws in force regulating the occupation." (*St. Joseph v. Levin*, 128 Mo. 588, [49 Am. St. Rep. 577, 31 S. W. 101]. See, also, *Ex parte Lichtenstein*, 67 Cal. 359, [56 Am. Rep. 713, 7 Pac. 728].)

In the consideration which is to follow, therefore, it is to be borne in mind that we are not dealing with a harmless and legitimate business requiring no regulation, and which, if licensed at all, could be licensed only for purposes of revenue. We are dealing with a business which is, and always has been, subject to police regulation, and which is unlawful if not conducted under the provisions, restrictions, and requirements of the law. The present case presents, then, the question of a statute drafted in the plain exercise of the police power, requiring the doing of certain things, and imposing a penalty for their non-performance. Is a contract made without observance of the terms of such statute valid or void? It is of course undisputed that a contract in violation of a statute is void, and no difficulty can arise in such a case. More trouble has been experienced by the courts where the case has been one in which there has been no express prohibition of the act, but where a penalty for the performance or non-performance has been imposed. A statute may either expressly command, prohibit, or enjoin an act, or it may impliedly command, prohibit, or enjoin it by fixing a penalty for the non-performance or commission thereof. As to the effect of such implied prohibitions there was much divergence of opinion upon the part of the English judges, and this difference of view found its way into conflicting and irreconcilable decisions of the courts of our different states. Thus in *Brown v. Duncan*, 10 B. & C. 93, the action was on a guaranty for sales of liquor, which had been distilled without a license under a statute requiring a license and affixing a penalty. It was held that these were mere revenue regulations, and that a breach did not render the trade so illegal as to prevent a recovery for sales. This case was distinguished from the case of *Law v. Hodgson*, 2 Camp. N. P. 147, which was an action for the value of bricks of dimensions smaller than that required by statute, which statute affixed a penalty for violation. The statute declared merely that bricks shall be made of such dimensions. Lord Ellenborough said: "The first section of this statute absolutely forbids such bricks to be made for sale. Therefore, the plaintiff, in making the bricks in question, was guilty of an absolute breach of the law; and he shall not be permitted to maintain an action for their value." The distinction declared in *Brown v. Duncan* was that the

statute in *Law v. Hodgson* was designed to protect the public; while that in the case before them was a mere revenue regulation. The influence of these and other like decisions, appealing, as they have, with differing force to the judges of our state courts, has led to much confusion of decision; a confusion, however, which the learned decision of the supreme court of the United States in *Harris v. Runnells*, 53 U. S. 79, should do much to eliminate. But it is to be noticed that every case from every court recognizes that when a statute has been made for the protection of the public, a contract in violation of its provisions is void. (*Woods v. Armstrong*, 54 Ala. 150, [25 Am. Rep. 671]; *Griffith v. Wells*, 3 Denio, 226; *Cope v. Rowlands*, 2 Mees. & W. Rep. 149; *United States Bank v. Owen*, 27 U. S. 526; *Burck v. Taylor*, 152 U. S. 634, [14 Sup. Ct. 693]; *Müller v. Ammon*, 145 U. S. 421, [12 Sup. Ct. 884]; *Berka v. Woodward*, 125 Cal. 119, [73 Am. St. Rep. 71, 57 Pac. 777]; *Jackson v. Shaw*, 29 Cal. 267; *Johnson v. Simonton*, 43 Cal. 242.)

As has been pointed out, sections 338 and 339 of our Penal Code make every person carrying on the business of a pawnbroker, except by the authority of a license, guilty of misdemeanor; also every person carrying on such business, if he fails at the time of the transaction to enter in a register kept by him for that purpose, in the English language, the date, duration, amount, and rate of interest of every loan made by him, an accurate description of the property pledged, and the name and residence of the pledgor, and to deliver to the pledgor a written copy of such entry, and to keep an account in writing of all sales made by him. It has also been shown that these provisions are, one and all, enacted under the police power for the regulation of the business and the protection of the needy and improvident and of the general public against oppression and fraud. It has further been shown that where a statute, designed for the protection of the public, prescribes a penalty, that penalty is the equivalent of an express prohibition, and that a contract in violation of its provisions is void. "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case." (*Coppell v. Hall*, 74 U. S. 542; *Berka v. Woodward*, 125 Cal. 119, [73 Am. St. Rep. 31, 57 Pac. 777].) Where the contract is void, the right of the pledgee

to hold the property, which right depends upon a valid contract, is of course lost. (*Hilgert v. Levin*, 72 Mo. App. 48.) It follows in this case, therefore, that these contracts are void, that the lien is lost, and that the judgment should be for plaintiff, unless, as respondent contends, the contracts in this case are severable, as in *Jackson v. Shawl*, 29 Cal. 267. *Jackson v. Shawl* held that where a pawnbroker had loaned money upon property pledged, and the borrower had contracted to pay him more than four per cent interest per month, the borrower could recover possession of the property by tendering the principal and four per cent per month interest, four per cent being the maximum charge permitted to pawnbrokers. The act did not provide that the contract was void, but only that the lender rendered himself liable to a forfeiture of the excess, in a separate suit to be brought for that purpose. It is to be noticed that the illegality of the contract in *Jackson v. Shawl* went only to the excess of interest charged, and this court applied the general and liberal principle fully recognized by the law, that when any matter, void even by statute, be joined with good matter which is entirely independent of it, the good part shall stand and the rest be held void. But in the case at bar the illegality and the prohibition go to the whole substance of the contract. It is a prohibition of the law from entering into such a contract at all, and the illegality affects the whole transaction from its inception. It is in this respect identical with the pawnbroker case of *Ferguson v. Norman*, 5 Bing. N. C. 76. In that case a tailor had become bankrupt, but, prior to his bankruptcy, had pawned certain goods with the defendant pawnbroker. The English law required the insertion in the books of the pawnbroker of the name of the pledgor and of his residence, with street, place, or square, and whether or not the pledgor was housekeeper or lodger, and required the pawnbroker to make these entries before advancing money. The pawnbroker inserted as pledgor the name of Reeves instead of Bullock, the tailor, gave his residence as Pimlico instead of Haymarket, failed to enter any street, place, or square as his place of residence, and, though Bullock was a housekeeper, entered him in many cases as a lodger. The court said: "A distinction may easily be drawn as to those duties imposed on the pawnbroker which are entirely collateral to the individual contract: and it would be too much to say,

because he had not observed the enactment of the statute in such matters, that therefore the contract made by him should be void. Suppose an instance in which his name was required to be put up over the door, and some mistake had been made. A penalty is given for not putting up the name; but it would not follow that contracts entered into by an individual whose name had been incorrectly spelled, would be therefore void. However, when we look at the present section, the case is extremely simple. . . . This, therefore, being the object and intention of the legislature, and the requisites being such as are to be performed at the time of, and previously to, entering into the contract, I think the contract must be held to be void, notwithstanding there are specific penalties for the omission of such requisites. . . . And it comes around to this, that, if the contract be void, the lien is void also, and I see no ground on which the right of the pawnbroker to resist this action can be set up."

For the foregoing reasons the judgment is reversed, with instructions to the court to enter judgment for plaintiff as prayed for.

McFarland, J., and Lorigan, J., concurred.

[S. F. No. 3888. Department One.—January 8, 1907.]

THE PEOPLE, Respondent, v. J. S. McCUE and KITTIE G. McCUE, Appellants.

PUBLIC NUISANCE — OBSTRUCTION OF HIGHWAY — ABATEMENT — CIVIL ACTION BY PEOPLE — AUTHORITY OF DISTRICT ATTORNEY.—An unlawful obstruction of a public highway is a public nuisance, which the district attorney, under the act of March 15, 1899, has authority of his own motion to bring a civil action in the name of the people to abate, without any previous order of the board of supervisors directing him to do so.

Id.—CUMULATIVE REMEDIES.—The fact that other remedies may exist for the abatement of such public nuisances as obstructions of public highways cannot affect the power expressly conferred by law upon the district attorney.

Id.—OBSTRUCTION OF STREETS—PLEADING—FINDINGS—PROBATIVE AND ULTIMATE FACTS—SUPPORT OF JUDGMENT.—In an action to abate

obstructions to several streets, where, independently of probative facts alleged and found, it was unconditionally alleged and found as a fact that "each and all of such streets are public highways," that is an ultimate fact, and where the probative facts found are not necessarily inconsistent therewith, and no evidence appears in the records, the finding of that ultimate fact must prevail, and is sufficient to support a judgment for the people abating the obstructions.

ID.—CONSTRUCTION OF FINDINGS.—If findings of fact are reasonably susceptible of such a construction as will support the judgment, they must receive that construction rather than one which will not support it.

ID.—FAILURE TO FIND UPON AFFIRMATIVE DEFENSE—ABSENCE OF EVIDENCE.—The failure of the court to find upon an affirmative defense pleaded in the answer is immaterial where there is no evidence in the record, and it does not appear that any evidence was introduced in support of such defense.

APPEAL from a judgment of the Superior Court of Marin County. Thomas J. Lennon, Judge.

The facts are stated in the opinion of the court.

H. V. Morehouse, J. E. Alexander, and M. C. Dufficy, for Appellants.

Thomas P. Boyd, District Attorney, for Respondent.

ANGELLOTTI, J.—This action was brought by the district attorney of Marin County in the name of the people of the state, to abate, as public nuisances, obstructions maintained by defendants in certain alleged public highways of said county. As to certain of said alleged public highways judgment was given in favor of plaintiff, declaring the same to be public highways, and the obstructions thereon maintained by defendants to be public nuisances, directing the removal of said obstructions by defendants, and enjoining defendants from maintaining on said highways any obstruction which would interfere with the right of the public to use the same as public highways. Defendants have appealed from this judgment on the judgment-roll alone.

By express provision of statute, anything which unlawfully obstructs the free passage or use, in the customary manner, of a public highway is a public nuisance. (Civ. Code, secs. 3479,

3480; Pen. Code, sec. 370. See, also, *Siskiyou Lumber etc. Co. v. Rostel*, 121 Cal. 511, 513, [53 Pac. 1118]; *Marini v. Graham*, 67 Cal. 130, [7 Pac. 442]; *Lewiston Turnpike Co. v. Shasta etc. Co.*, 41 Cal. 562, 564.)

Under the express provisions of the act of March 15, 1899, authorizing the district attorney of any county in which a public nuisance may exist to bring a civil action in the name of the people of the state to abate the same (Stats. 1899, p. 103), the district attorney was empowered to commence and maintain this action without any previous order of the board of supervisors directing him to so do. The act requires him to bring such an action when directed by the supervisors, and authorizes him to do so on his own motion and without any order to that effect whenever he deems such action proper. The fact that other remedies may exist for the abatement of such public nuisances as obstructions of public highways cannot affect the power in this regard conferred upon the district attorney by the act of March 15, 1899.

The main argument for reversal of the judgment is based upon the contention that the probative facts alleged in the complaint and found by the trial court do not show that the alleged public highways are in fact public highways, and in support of this contention learned counsel urge that such probative facts tending to show a dedication of such highways by defendant to the public and acceptance of the same, are not sufficient to establish a dedication and acceptance.

If we assume this to be true, we do not see how it can avail defendants on this appeal. Independently of the probative facts alleged, it was in terms unconditionally alleged in the complaint "that each and all of such streets are public highways." The trial court, in addition to finding certain probative facts, found as a fact in express terms and unconditionally "that each and all of said streets are public highways." This was undoubtedly a finding of the ultimate fact (*Bequette v. Patterson*, 104 Cal. 282, 285, [37 Pac. 917]). Defendants claim that this finding must be treated as a conclusion of law based upon the probative facts found, or as a mere general conclusion of fact from the specific facts previously found, but the record does not warrant us in so considering it. It is contained in the "Findings of Fact," as distinguished from the "Conclusions of Law," and therefore

does not fall within the rule declared in such cases as *Levins v. Rovegno*, 71 Cal. 273, [12 Pac. 161]; *Savings and Loan Soc. v. Burnett*, 106 Cal. 514, 538, [39 Pac. 922]; and *Niles v. City of Los Angeles*, 125 Cal. 572, 578, [58 Pac. 190], where it was sought to treat a purported conclusion of law as a misplaced finding of fact. In those cases it was plain on the face of the record that the alleged finding was merely what it purported to be,—viz. a conclusion drawn by the court from the facts previously found. Nor is there anything on the face of the finding under discussion to indicate that it was simply a conclusion from the probative facts previously found, and herein this case differs from such cases as *People v. Reed*, 81 Cal. 70, 76, [15 Am. St. Rep. 22, 22 Pac. 474], and *Geer v. Sibley*, 83 Cal. 1, [23 Pac. 220]. In *People v. Reed* the finding was “that by the acts, facts and matters above found and recited, said premises above referred to” were dedicated, etc., and it was held that this must be considered as a mere conclusion, the court saying: “This finding is based upon the other facts found. It recites in terms that ‘*By the acts, facts and matters above found*, said premises were by said parties dedicated.’ It may be that if this finding had stood alone, and had not been put in this argumentative form, it might have been upheld as a sufficient finding of an ultimate fact. But this cannot be so where the facts are fully found, and the general finding of a dedication is expressly drawn as a conclusion from such facts. Counsel say it does not appear that the court found all of the facts proved. But it does appear from the finding itself that it was based entirely upon the facts found, and not, in whole or in part, on facts proved but not found. Therefore, if the specific facts found do not support this one, which is a summing up of the others, the judgment should be reversed.” The situation was practically the same in *Geer v. Sibley*, 83 Cal. 1, [23 Pac. 220]. In the case at bar, as we have seen, the finding did not purport to be drawn as a conclusion from anything previously found, and was in no way argumentative in form, and it is only by indulging in surmise or conjecture that we could hold it to have been so drawn. This we are not permitted to do for the purpose of disturbing the judgment of the trial court. It is elementary that if findings of fact are reasonably susceptible of such a construction as will support

a judgment, they must receive that construction rather than one that will not so support it. Nor is there anything in the findings of probative facts that is at all necessarily inconsistent with the finding under discussion. All of those probative facts may be true and the finding under discussion also be true.

It is well settled in this state that a clear, specific finding of the ultimate fact must prevail over findings of probative facts, where there is no necessary conflict between the probative facts found and the finding of the ultimate fact. Thus, in *Smith v. Acker*, 52 Cal. 217, it was claimed, upon an appeal on the judgment-roll alone, that in view of probative facts found, the finding as to ownership of land could not be sustained. After stating that the transcript did not show clearly that the numerous probative facts found were all the probative facts shown by the evidence, the court said: "It has been held that where facts are found from which the existence of the ultimate fact must be conclusively inferred, the finding is sufficient as a finding of the ultimate fact. But when the ultimate fact is found, no finding of probative facts, which may tend to establish that the ultimate fact was found against the evidence, can overcome the principal finding." The same ruling was made in *Frazier v. Crowell*, 52 Cal. 399, 402, where there was no necessary conflict between the finding of ultimate fact and the findings of probative facts. The same rule was declared in *Gill v. Driver*, 90 Cal. 72, [27 Pac. 64], where it was assumed that the probative facts found were insufficient to support the judgment, the court saying: "Ultimate facts were found which do support the judgment; and they are not questioned, nor could they be, without bringing up the evidence in a statement or bill of exceptions." The same rule has been adhered to in several later cases. (See *Perry v. Quackenbush*, 105 Cal. 299, 305, [38 Pac. 740]; *Rankin v. Newman*, 107 Cal. 602, 608, [40 Pac. 1024]; *Com. Bank v. Redfield*, 122 Cal. 405, 408, [55 Pac. 160]; *Brown v. Mutual Reserve etc. Assn.*, 137 Cal. 278, [70 Pac. 187].) It is only where the probative facts found are necessarily in conflict with the ultimate fact found, that the findings of probative facts can prevail over a clear and express finding of ultimate fact. (See *Howeth v. Sullenger*, 113 Cal. 547, 551, [45 Pac. 841].)

It is therefore clear that the finding under discussion must be treated as a finding of the ultimate fact of public highway, and must be held to be sufficient on that point regardless of the question as to the sufficiency of the probative facts found. It follows that the findings sufficiently support the judgment. In the absence of a bill of exceptions or statement showing the evidence, the question as to the sufficiency of the evidence to sustain the finding cannot of course be considered.

Complaint is made that the trial court failed to find upon certain affirmative allegations made in the answer, such as that the alleged streets were never accepted or used by the public, that the board of supervisors had refused to accept the same, and that the board of supervisors had abandoned the same as public highways. If it be conceded that any of these matters are not sufficiently embraced in the finding of public highway already discussed, it does not appear that any evidence was introduced in support of such allegations. It is well settled that a failure to find upon some issue made by the answer, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue. (See *Roberts v. Hall*, 147 Cal. 434, 439, [82 Pac. 66]; *Winslow v. Gohransen*, 88 Cal. 450, [26 Pac. 504]; *Himmelman v. Henry*, 84 Cal. 104, [23 Pac. 1098]; *Marchant v. Hayes*, 117 Cal. 669, 672, [49 Pac. 840]; *Bliss v. Sneath*, 119 Cal. 526, 529, [51 Pac. 848]; *Rogers v. Duff*, 97 Cal. 63, 69, [31 Pac. 836].)

The judgment is affirmed.

Shaw, J., and Sloss, J., concurred.

Hearing in Bank denied.

[S. F. Nos. 4077, 4013. Department One.—January 8, 1907.]

T. L. JOHNSON, Appellant, v. JOHN TAYLOR, Administrator, etc., et al., Respondents.

TAXATION—SALE—REDEMPTION—LAW IN FORCE AT TIME OF SALE—POWER OF LEGISLATURE.—The law in force at the time of a sale for taxes regulates the right of redemption therefrom; and it is not within the power of the legislature to take away that right, or prejudicially to affect it, by subsequent legislation.

ID.—LAW REQUIRING NOTICE TO OWNER—ABSENCE OF NOTICE—CHANGE OF LAW—INVALIDITY OF DEED TO STATE.—Where the law in force at the time of a tax-sale required the purchaser or his assignee, within thirty days prior to the expiration of the time for redemption, or before a deed was applied for, to serve written notice upon the owner or occupant of such expiration or application, and to file an affidavit with the tax-collector showing such service, before a deed could be issued, and where the law was changed prior to the tax-deed dispensing with such notice, a deed made by the tax-collector to the state without such notice and affidavit passed no title thereto, and a subsequent deed by the state to a third party is void and cannot support an action to quiet title against the owners of the property.

ID.—ACTION TO QUIET TITLE—CROSS-COMPLAINT—JUDGMENT FOR DEFENDANTS—WAIVER OF OBJECTION.—Where the defendants in an action to quiet title sought by cross-complaint to quiet their title against the plaintiff, and without objection thereto by demurrer or motion to strike out plaintiff answered the cross-complaint, and a trial was had upon the merits, and judgment was rendered affirmatively, quieting the title of defendants, the plaintiff must be deemed to have consented to the mode of procedure, and the objection that affirmative relief could not be granted to defendants under their cross-complaint cannot be urged by plaintiff upon appeal for the first time without regard to the question of merit in the objection.

APPEAL from a judgment of the Superior Court of Mendocino County and from an order denying a new trial. J. Q. White, Judge.

The facts are stated in the opinion of the court.

Thomas, Pemberton & Thomas, for Appellant.

Mannon & Mannon, for Respondents.

SLOSS, J.—The plaintiff brought this action to quiet title to certain land in Mendocino County. The defendants answered, denying the plaintiff's title, and filed cross-complaints setting up title in themselves and praying that their title be quieted against the plaintiff. Judgment went for the defendants, granting them the affirmative relief sought by them. The plaintiff's motion for a new trial was denied, and he now appeals from the judgment and from the order denying his motion for a new trial.

Defendants are the heirs and successors in interest of W. H. Johnson, and it is admitted that they are the owners of the land, unless W. H. Johnson's title was divested by certain tax proceedings culminating in a deed from the state of California to the plaintiff. The land in question was assessed to W. H. Johnson for the year 1893, and was sold to the state for non-payment of taxes on July 7, 1894. The tax-collector executed a deed to the state on July 7, 1899, and a deed was executed to the plaintiff by the tax-collector, acting under the authorization of the state controller, on May 3, 1902. On account of some irregularities in the original deed to the state, an amended deed to the state was executed on April 8, 1902. (Pol. Code, sec. 3805b; Stats. 1901, p. 651.)

At the trial the defendants interposed various objections to the introduction in evidence of these instruments. The objections were sustained, and the appellant upon the appeal from the order denying his motion for a new trial seeks to review these rulings. If any of the objections made was good, the evidence of the tax proceedings was properly excluded. We are satisfied that the respondents are correct in their contention that there is at least one fatal objection to the validity of the tax-deeds to the state, and it will be unnecessary, therefore, to consider the other objections. In 1894, when the sale of the property was made, the Political Code provided that if property sold for non-payment of taxes was not redeemed within the time allowed by law the tax-collector must make to the purchaser, or his assignee, a deed of the property; providing, however, that such purchaser, or his assignee, must, thirty days previous to the expiration of the time for such redemption, or thirty days before he applies for the deed, serve upon the owner of the property, or upon the person occupying it, a written notice showing, among other things,

when the right of redemption will expire, or when the purchaser will apply for a deed. And it was provided that no deed should be issued by the tax-collector until this notice should have been given, and an affidavit filed with the tax-collector showing that it had been given. (Pol. Code, sec. 3785, amended 1891; Stats. 1891, p. 134.) Section 3780 of the same code provided that a redemption might be made by the owner or any party in interest within twelve months from the date of the purchase, or at any time prior to the filing of the affidavits and the application for a deed, as provided for in section 3785. (Stats. 1891, p. 133.) As the law then stood, a deed could not be issued to the purchaser without the giving of the notice required by section 3785 (*Hughes v. Cannedy*, 92 Cal. 382, [28 Pac. 573]), and one relying on a tax-deed was bound to establish the giving of such notice as a part of his proof of title. (*Miller v. Miller*, 96 Cal. 376, [31 Am. St. Rep. 229, 31 Pac. 247]; *Reed v. Lyon*, 96 Cal. 501, [31 Pac. 619]; *Walsh v. Burke*, 134 Cal. 594, [66 Pac. 866].) Furthermore, this court has held in *San Francisco etc. Land Co. v. Banbury*, 106 Cal. 130, [39 Pac. 439], that the requirement of giving notice applied as well to the state as to a private purchaser.

In the case at bar there was no proof of any such notice having been given, and it would follow, if the case is to be decided on the law as it existed when the sale was made, that the plaintiff failed to establish that any title ever passed from W. H. Johnson to the state.

The appellant contends, however, that the validity of the deed is to be determined by the provisions of law existing at the time such deed was made, rather than at the date of sale. Between 1894, when the sale took place, and 1899, when the deed was executed, the law relating to redemption from tax-sales and the execution of tax-deeds was materially altered. In 1895 the legislature passed a series of amendments to the Political Code, changing the entire scheme of tax-sales. Since 1895 it is provided that all property sold for delinquent taxes shall be sold to the state, and no sales to private purchasers are permitted, as they were prior to the time of these amendments. (Pol. Code, sec. 3771; Stats. 1895, p. 377.) By section 3785, as then amended, the tax-collector is required to make a deed to the state if the property is not redeemed

within the time (five years) allowed by law for its redemption. The provision for notice of intention to provide for a deed was eliminated from section 3785. Section 3780 was at the same time amended so as to provide that a redemption might be made within five years from the date of the purchase, or at any time prior to the entry or sale of the land by the state. And the land became subject to such entry or sale immediately upon the filing of the tax-collector's deed with the proper officer. (Pol. Code, sec. 3788, 3897.)

To apply section 3785, as amended, to sales made before the amendment went into effect, would undoubtedly give the amendment a retroactive effect. Whatever may be the general rule as to construing sections of the code so as to prevent their having a retroactive effect (Pol. Code, sec. 3), the legislature has, in this instance, declared plainly its intent that the amendment to section 3785 should apply to all tax-deeds thereafter made, whether or not the sale had already taken place. It appears that the legislature in 1895 enacted two different amendments to section 3785 of the Political Code. They are substantially similar so far as the points already noted are concerned. One was approved February 25, 1895, and the other March 28, 1895. The latter, after setting forth the provisions for the making of a deed by the tax-collector to the state, in the event the property is not redeemed within the time allowed by law, contains the following language: "In all cases where land has heretofore been sold to the state for delinquent taxes, the deed therefor shall be made to the state within one year after this act takes effect; provided five years shall have elapsed after the date of such sale." In view of this provision it cannot be doubted that the legislature intended to make and did make section 3785 apply to cases of sales made prior to the adoption of the amendment, and such amendment must therefore be given a retroactive effect, unless some constitutional right would be violated by giving it such effect.

Ordinarily "the right of redemption from a tax-sale must be governed by the law in force at the time of the sale; it cannot be affected by subsequent legislation." (Black on Tax Titles, sec. 175.) In *Teralta Land etc. Co. v. Shaffer*, 116 Cal. 518, [58 Am. St. Rep. 194, 48 Pac. 613], this court said: "The question here, however, is: Can the legislature, after

a tax-sale, lawfully amend the law so as to provide new and more onerous conditions to the right to redeem than those which existed when the sale was made? We think this question is answered in the negative by the elementary writers and by the adjudicated cases." In support of this conclusion the court cites Cooley on Constitutional Limitations, 6th ed., p. 353; Black on Tax Titles, sec. 175; Blackwell on Tax Titles, 5th ed., sec. 729; *Negus v. Yancey*, 22 Iowa, 57; *Goenen v. Schroeder*, 8 Minn. 387; *Robinson v. Howe*, 13 Wis. 341; *Conway v. Cable*, 37 Ill. 82, [87 Am. Dec. 240]; *Moody v. Hoskins*, 64 Miss. 468, [1 South. 622]; *Caruthers v. McLaran*, 56 Miss. 371; *Wolfe v. Henderson*, 28 Ark. 304. In the *Teralta* case the court quotes the following from *Merrill v. Dearling*, 32 Minn. 479: "The right of property acquired by the purchaser at this sale and the right of redemption remaining to the owner must both be governed by the law in force at the time of sale. Neither, in our judgment, could be either abridged or enlarged by subsequent legislation. This is unquestionably so as to the right of the purchaser. The same rule ought to apply in favor of the owner as against any statute shortening the time to redeem, as it is equally unjust to legislate against the owner of the land as in his favor." Accordingly, it was held in the *Teralta* case that the legislature could not constitutionally, as to past tax-sales, pass a law increasing the penalties to be paid on redemption. See, also, *Collier v. Shaffer*, 137 Cal. 319, [70 Pac. 177], in which the court said: "The redemption of land so sold to the state is governed by the law in force at the date of the sale." If *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 517, and *Moore v. Martin*, 38 Cal. 428, are inconsistent with these views, they must be regarded as overruled by later cases. (See *Welsh v. Cross*, 146 Cal. 621, 630, [106 Am. St. Rep. 63, 81 Pac. 229].)

We think the principle of *Teralta Land etc. Co. v. Shaffer*, 116 Cal. 518, [58 Am. St. Rep. 194, 48 Pac. 613], is decisive of the case at bar. Under the law as it existed at the time of the sale, the plaintiff's right of redemption was not limited by any fixed time. It lasted at least one year, and would last indefinitely thereafter, until thirty days after the purchaser should give the notice required by the statute. As was said in *California etc. R. R. Co. v. Mecartney*, 104 Cal. 616, [28 Pac. 448]: "It is provided (Pol. Code, sec. 3780) that a

redemption may be made within twelve months from the date of the purchase, or at any time prior to the filing of certain affidavits and the application for the deed. 'Or' may be read 'and,' for it is evident that all the recited events must happen before the owner will be deprived of his right to redeem." To change a right of redemption which lasts indefinitely until the performance by a third party of some act which may or may not be performed, to a right limited by the expiration of a definite period of time is a substantial change in the right. And while, under the amendments of 1895, the right of redemption does not end absolutely with the expiration of the five years, it does end, without any notice to the owner, as soon as the state sees fit to dispose of the land. Under the old law the owner could rest secure until he received notice of intention to apply for a deed. He then had thirty days in which to redeem. Under the new law his right of redemption could be cut off at any moment after the expiration of the statutory period, without any personal notification to him.

Again, the rights of the owner are injuriously affected in another respect if the amendment is permitted to operate on past sales. Under the old law, not only does his right to redeem continue until after he has received the statutory notice, but no deed can issue to the purchaser until such notice has been given. By the amendment, the state receives its deed at once on the expiration of the five years. Such deed, when duly acknowledged or proved, is primary evidence of the regularity of the assessment, of the equalization, of the levy of taxes, of the non-payment of taxes, of the sale, of non-redemption, of the execution of the deed by the proper officer, and is conclusive evidence of the regularity of all other proceedings from the assessment to the execution of the deed. (Pol. Code, secs. 3786, 3787.) Furthermore, such deed transfers to the state "the absolute title to the property described therein." (Pol. Code, sec. 3787.) It is not necessary here to decide whether or not the legislature has the power to alter the rules as to burden of proof of facts recited in deeds already executed—a question on which the authorities are in conflict. (See *Strode v. Fisher*, 17 Or. 50, [16 Pac. 926]; *Smith v. Cleveland*, 17 Wis. 556; *Marx v. Hanthorn*, 30 Fed. 579; *Tracy v. Reed*, 38 Fed. 69; cf. *Emeric v. Alvarado*, 90 Cal. 444, 465, [37 Pac. 356].) But certainly there can be

no doubt that there is a material distinction between the position of a delinquent taxpayer before a deed divesting his title and having the probative force given by sections 3786 and 3787 has been executed, and his position after the execution of such deed, even though a right of redemption may remain in him for a time. And the conclusion follows that a law which authorizes the making of a deed at a fixed time, where, under the law in force at the date of sale, a deed could not be made until thirty days after the giving of notice by the purchaser, is a change which affects the substance of the owner's right, rather than one which goes merely to the remedy.

There is a marked distinction between this case and *Oullahan v. Sweeney*, 79 Cal. 537, [12 Am. St. Rep. 172, 21 Pac. 960], relied on by the appellant. In that case there had been a tax-sale under a law which allowed a fixed period of time for redemption. After the sale the law (Pol. Code, sec. 3785) was amended by the insertion of the provision above discussed requiring the purchaser to give thirty days' notice of his intention to apply for a deed, and extending the time for redemption until such notice was given. The court held, following *Curtis v. Whitney*, 13 Wall. 68, that this amendment was effective as to all applications for deeds made after the amendment. The ground upon which this was put was that it did not, as against the purchaser, extend the time for redemption. Such purchaser could still obtain his deed at the expiration of twelve months, provided he took the steps required by the statute. It rested entirely with him whether or not he chose to take these steps. It is argued that the case at bar is the converse of the Oullahan case; that if it be not an invasion of the purchaser's right to require him to give thirty days' notice in order to cut off the right of redemption, it is no invasion of the owner's right to take away the provision of notice. But the cases are not analogous. As was stated by this court in *Allen v. Allen*, 95 Cal. 187, [30 Pac. 213], in speaking of the ruling in *Oullahan v. Sweeney*: "This requirement (i. e. that of notice) was a mere incident to the right of the purchaser to receive a deed; it merely prescribed the manner in which he should proceed to demand the deed to which he was entitled." There was, as to him, simply a change in the procedure which he must follow in order to get

his deed. But the situation of the owner, who is deprived of the notice, is different. Under the law as it stood at the date of sale he had thirty days after the service of notice in which to redeem, and during these thirty days he was the owner of the land, subject only to the lien of the state for taxes. After the amendment dispensing with the requirement of notice, his right of redemption ended, without notice to him, at a time very different from, and possibly earlier than, the time when it would have expired under the old law. And, as has been pointed out, his title was divested at the expiration of a fixed, instead of an indefinite period. That these circumstances worked a substantial change in the rights which the owner had at the date of the sale seems clear.

Inasmuch as the plaintiff failed to prove the giving of the required notice, neither deed operated to convey W. H. Johnson's title to the state, and all of the instruments offered by plaintiff were properly excluded. This disposes of the appeal from the order denying a new trial.

On the appeal from the judgment it is urged that the court erred in granting to the defendants the affirmative relief asked by them in their cross-complaints. This contention is based on the view, expressed several times by this court, that in an action to quiet title a cross-complaint by a defendant who claims title in himself is not necessary. (*Wilson v. Madison*, 55 Cal. 5; *Miller v. Luco*, 80 Cal. 257, [22 Pac. 195]; *Mills v. Fletcher*, 100 Cal. 142, [34 Pac. 637].) If these cases have not been overruled, their authority has, as to the point under discussion, been seriously impaired by *Islais etc. Water Co. v. Allen*, 132 Cal. 432, [64 Pac. 713]. Furthermore, no objection seems to have been raised in the court below to the mode of pleading. The plaintiff did not attack the cross-complaints either by demurrer or by motion to strike out. He answered and went to trial on the merits. Under these circumstances we think he should be held to have consented to the method of procedure which was followed, and that he cannot now be heard to make this objection, even if it could be conceded that there is any merit in the objection itself.

The judgment and order appealed from are affirmed.

Angellotti, J., and Shaw, J., concurred.

[S. F. No. 4046. Department Two.—January 8, 1907.]

RALPH W. S. CUMMINGS, Respondent, v. STROBRIDGE LAND SYNDICATE, PACIFIC IMPROVEMENT COMPANY, MARY J. BLASINGAME et al., Appellants; and C. G. SAYLE, Co-Defendant.

FORECLOSURE OF GUARDIAN'S MORTGAGE BY WARD—RELEASE BY GUARDIAN—PARTIES—FAILURE OF WARD TO TESTIFY—INSTIGATION OF ACTION—WANT OF EQUITY.—In an action by an adult ward to foreclose a mortgage executed to him by his guardian more than twenty years previously, when the ward was one year old, to secure money "borrowed" or appropriated by the guardian without order of court, and which was released by the guardian without order of court, in favor of subsequent mortgagees and purchasers, made parties defendant with the guardian, where the plaintiff failed to testify whether the guardian had settled with him or not, or whether anything was due, and where it appears that plaintiff lived with and had been always supported by his guardian, who was his step-father, and that the action was instigated and controlled by the guardian defendant and plaintiff's mother, it is sufficiently shown to be without equity.

ID.—CONTRACTS—PARTIES—INCAPACITY OF INFANT WARD.—There must be two parties to every contract; and a note and mortgage to be of any validity must be legal contracts. An infant one year of age, being plainly incapable of contracting, it may be seriously doubted whether any contract could be said to exist at all between the guardian and his infant ward.

ID.—MISAPPROPRIATION OF MONEY—EMBEZZLEMENT.—The money alleged to have been "borrowed" from the infant and appropriated to the guardian's use without any order of court was misappropriated or embezzled by him; and the note and mortgage to the ward could be no defense to such embezzlement.

ID.—EFFECT OF RELEASE—MONEY BORROWED FROM NEW MORTGAGEE—WARD'S PROPERTY—MAXIM OF EQUITY.—Where the release of the mortgage by the guardian without an order of court was made to induce another mortgagee to advance money to the guardian in the same amount, his intention not to make it the ward's money is immaterial. Equity makes such money the property of the ward, in pursuance of its maxim that it will regard as done that which ought to be done.

ID.—SECOND EMBEZZLEMENT.—Any misappropriation of the ward's money received from such other mortgagee in consideration of the release of the first mortgage made to the ward for money embezzled was only a second embezzlement of the ward's money.

ID.—PROTECTION OF INNOCENT PURCHASERS—CLEARING OF UNDISCLOSED LIEN — CONSEQUENCES OF FURTHER MISAPPROPRIATION.— Where innocent purchasers of the mortgaged property paid full value therefor to the guardian, in honest ignorance of the situation, and relying upon the absence of any apparent encumbrance of record; conceding that the ward had in fact an undisclosed lien upon the property, so much of the money paid by the purchasers as may be necessary to clear this lien must be deemed taken by the guardian as money of the ward; and if the guardian thereafter made further misappropriation of it the purchasers are protected against its consequences.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

John S. Chapman, Johnston & Jones, Stanton L. Carter, Platt & Bayne, and H. H. Welsh, for Appellants.

Coldwell & Borland, and N. C. Coldwell, for Respondent.

HENSHAW, J.—This is an action to foreclose a mortgage alleged to have been given by the defendant Sayle to plaintiff on the fifteenth day of November, 1881, to secure the payment of a promissory note made by Sayle at the same date. The amount of the promissory note was two thousand dollars. A trial was had, resulting in judgment for plaintiff in the sum of \$16,480.50, and for a decree of the sale of the mortgaged premises. The motion for a new trial was denied, and certain of the defendants appeal from the judgment and from the order denying their motion. The salient facts of the case are these: Sayle, who was a practicing lawyer, married the mother of the plaintiff, who was then an infant about a year old. He was appointed guardian of the person and estate of the infant, and there came into his possession as such guardian of the estate the sum of two thousand dollars. He continued to act as guardian, and the court finds that he remained such guardian until the sixteenth day of May, 1901, at which time the child attained its majority; but in fact there was never any settlement of Sayle's account as guardian, nor was there ever anything done in reference to the guardian-

ship, and he was never discharged. Immediately upon, or shortly after, receiving this two thousand dollars belonging to his infant ward, Sayle, who was the leading witness for the plaintiff, declares that he "borrowed" the money. The fact appears to be that he appropriated it to his own use without any order of court—in brief, embezzled it. He testifies he made a promissory note to his ward, then about a year and a half old, in the sum of two thousand dollars, and executed a mortgage upon land which he owned, securing this note. He filed the mortgage with the county recorder of Fresno County, where the land was situated, and paid the fees for the filing, and delivered the promissory note to his wife, who was the mother of the plaintiff. None of these transactions, it is perhaps needless to say,—neither the "borrowing" of the ward's money, nor the giving of the note and mortgage,—was done by the authority of, or had the sanction of the court. About a year afterwards, desiring to borrow more money, he caused to be entered upon the margin of the record an acknowledgment of full payment and satisfaction of the mortgage and the debt thereby secured, signing it "Ralph Wardlaw Cummings, by C. G. Sayle, his duly acting and qualified guardian." This was signed and acknowledged by him on the 24th of October, 1882. Upon the same day that this release was made he gave a note and mortgage to one Baird for two thousand dollars, and received the money therefor. He says that he did not receive the two thousand dollars in gold coin from Baird on that day for Ralph Cummings, and he did not receive the two thousand dollars on that day to satisfy the mortgage; that he received it a few days afterwards from Mr. Baird. He did not tell Mr. Baird when he borrowed the money that it was the boy's; that he was doing it as part of the business of the plaintiff. He did tell Mr. Baird, when asked if he had put anything on the property, that he had put a two-thousand-dollar mortgage on it in favor of his boy, and told him also that he could control it, and that it would not bother his mortgage, if he would let him have the money and let his mortgage go on record. Baird only agreed to let him have the money upon his acknowledgment of payment and satisfaction of the mortgage to Ralph Cummings. Baird refused to have a second mortgage, and his mortgage was taken as a first mortgage, upon condition

of the payment and satisfaction of the mortgage already on the property. He had intended to replace the canceled mortgage of his ward by placing a second mortgage upon the same property in favor of the ward. He did not, however, do this. Years afterwards he made another mortgage to the ward upon another piece of property, to secure the same indebtedness. A satisfaction of the Baird mortgage was entered on March 13, 1884, and on the same day Sayle mortgaged the same land to the predecessor in interest of defendant, Mary J. Blasingame, for three thousand dollars. Subsequent to these transactions he sold the land in parcels to different purchasers for its full value; that is to say, there was never any reduction of the purchase price because of the existence, or supposed existence, of any mortgage upon the property in favor of the plaintiff. The years passed and the ward grew to the age of majority. During this time he lived with his stepfather and was supported by him. There has never been any settlement of guardianship accounts, and it has never been determined whether Sayle is indebted to his ward, or whether, upon the other hand, the ward's estate is liable to him. Sayle filed a verified petition in insolvency during the ward's minority and made no mention of the mortgage which in this action is claimed to be subsisting and in full force against the property. The mortgage note, indeed, is not produced. Sayle explains that this was carelessly burned by him in the destruction of some worthless papers when he was changing his law-office. The plaintiff himself is not a witness in the case to testify as to any of these matters; as, for example, whether or not there was any sum due him from his guardian, because manifestly, if his guardian had in fact settled with him for this money so borrowed twenty and more years ago, equity would not permit the enforcement of the mortgage. And, more than this, not only is the plaintiff not a witness, but the suit seems to have been instigated and brought by his mother and stepfather. Thus, Mrs. Sayle, wife of Sayle, testifying as to a certain fact, says that she discovered it "in San Francisco when I started this suit." Many more circumstances could be pointed out, but these are sufficient to show that the action, while appealing to the equitable side of the court for the enforcement of a ward's rights, is one wholly without equity. The contention of plaintiff is that the guard-

ian had no power or authority, without the order of a court, to have released the mortgage, and that the mortgage stands as a valid and subsisting lien upon the property; that while it is true that the purchasers paid full price for the property, and that upon the record the mortgage to plaintiff had been released, yet these facts are not sufficient in defense, because they were put upon notice that the guardian could not release the mortgage except upon payment of the money and order of court. This was the view which the trial court adopted, and judgment passed for plaintiff accordingly.

Some interesting questions are here presented, the determination of which would unquestionably prove extremely embarrassing to plaintiff's case. Thus, plaintiff begins his proofs with a showing of this borrowed money by his guardian and the making of the so-called note and mortgage to him—the ward. But a note and mortgage, to be of any validity whatsoever, must be legal contracts, and to every contract there must be two parties. An infant of a year old is plainly incapable of contracting, and it may be seriously doubted, under the circumstances here disclosed, with the additional fact that one of the contracting parties stood in the confidential relation of guardian to the other, whether any contract could be said to exist at all. Certainly if Sayle had been indicted for embezzlement, his declaration that he had borrowed the money from his ward, and by contract had given a note and mortgage to an infant, of the tender age of one year, would scarcely be held to fill the measure of a valid defense. But aside from this and other like questions with which the case abounds, one proposition is determinative of the matter, and upon it this decision may rest. Assuming or conceding that the note and mortgage as given to the ward were valid so as to encumber the land, assuming also and conceding that the release of this mortgage was without authority of the court, conceding also that the witness Sayle does endeavor, though shufflingly and evasively, to have it appear that he did not pay over to his ward the money which he received from the Baird mortgage, the fact remains that equity itself, under such circumstances as those here disclosed, makes such payment in pursuance of its maxim that it will regard as done that which ought to have been done. When the money for the release of this mortgage came into Sayle's hands it

was, in equity, the ward's money, and any improper use which Sayle thereafter made of it was but a second embezzlement of the ward's funds. So, too, as to the innocent purchasers—the defendants here—who paid full value for their property. If they, in honest ignorance of the situation, paid full value for property which, so far as the record went, was clear of any encumbrance to this minor ward, and if in fact the ward had some undisclosed lien upon the property, so much of the moneys that these purchasers paid as might be necessary to clear this lien was taken by the guardian as money of the ward, and if the guardian thereafter made further misappropriation of it, the purchasers are protected against its consequences. This principle is plainly and elaborately enunciated in *Hadley v. Chapin*, 11 Paige Ch. 245, and if many more cases enunciating the same principle may not be cited, it may be said that few have had the temerity to maintain actions such as the one at bar, and that no cases can be found upholding a contrary doctrine.

It becomes unnecessary to consider the many other objections advanced by appellants, both to the rulings of the court in admitting and rejecting evidence and to the sufficiency of the evidence to sustain the judgment, because the proposition which we have enunciated is determinative of the case, for which reason the judgment and order appealed from are reversed as to all of the appealing defendants.

McFarland, J., and Lorigan, J., concurred.

[S. F. No. 3666. In Bank.—January 8, 1907.]

JOHN B. EARLE, Respondent, v. SUNNYSIDE LAND COMPANY, Appellant, and CALIFORNIA TITLE INSURANCE AND TRUST COMPANY et al., Respondents.

TRUST-DEED — CONSTRUCTION — PAYMENT OUT OF PROCEEDS OF LANDS SOLD — DILIGENCE OF LAND COMPANY — FORECLOSURE — FINDING OF NEGLIGENCE.—The provision in a trust-deed to secure creditors that they should be paid only out of the proceeds of sales by a land company party thereto, at not less than certain minimum prices,

is to be construed with its undertaking to use reasonable diligence in placing the lands upon the market and in making sales thereof, and the trust-deed cannot be construed as intending that the land company by violating its agreement could indefinitely postpone the right of the creditors secured to obtain payment out of the lands; and upon foreclosure by the creditors, where the court finds that the land company was negligent in its required duty to make sales, it will equitably subject the lands to the payment of the creditors by a judicial sale, without reference to the performance of the condition.

ID.—ABSENCE OF PERSONAL LIABILITY—"LIEN SECURITY."—The absence of the personal liability of the land company will not affect the foreclosure of the security, where by the terms of the instrument a "first-lien security" was provided for in favor of the trust company for the repayment of all advances by it; and the payment through it of unpaid purchase money due from the land company to its vendors was thereby secured.

ID.—PROVISION FOR "MINIMUM PRICES"—BENEFIT OF CREDITORS—POWER OF LAND COMPANY TO FIX PRICES NOT ARBITRARY.—The provision in the deed of trust for "minimum prices" was inserted for the benefit of the creditors secured, and is a restriction upon the right of the land company to sell at prices to be fixed by it according to its pleasure. Such right, however, is to be read with its covenant to use reasonable diligence to make sales, and in the light of the general purposes of the trust agreement; and cannot be construed as an arbitrary and unfettered power to fix prices which would make sales impossible, and indefinitely prevent the accomplishment of the purposes of the trust.

ID.—SUBROGATION OF CREDITOR TO ORIGINAL MORTGAGE-LIEN—FORECLOSURE FOR RESIDUE—FIRST LIEN.—Where there was an original mortgage upon the lands sold to the land company, which a bank at the request of the land company had advanced the money to discharge, to which security it was agreed that the bank was subrogated and had a "first lien" upon the property, to the unpaid residue of which the plaintiff had succeeded, he is entitled by subrogation to enforce a "first lien" for the residue out of the unsold lands. His rights are unaffected by the fact that the security for the bank passed through the hands of the trust company.

ID.—VALIDITY OF TRUST—EQUITABLE LIEN—FORM OF SECURITY NOT MATERIAL.—Regardless of the question of the validity of the deed of trust under section 857 of the Civil Code, the instrument may be sustained as an equitable mortgage or lien in favor of the creditors secured, which is enforceable as such. The form of the writing is not important provided it sufficiently appears that it was thereby intended to create a security.

ID.—FORECLOSURE OF LIEN—SALES AT "MINIMUM PRICES" NOT REQUIRED—POWER OF COURT.—Upon the foreclosure of the equitable lien of the creditors the judgment is not required to direct that

the sale of the lands be made at the "minimum prices" set forth in the trust agreement. That provision fell with the provision authorizing the company to make the sales, when by reason of its neglect to make sales the land company produced a condition which authorized a court of equity to take the security into its own hands, and the court was authorized to direct a sale in any just and equitable manner.

ID.—CONSTRUCTION OF DECREE AS TO TRUST COMPANY—SUPPORT OF FINDINGS.—Regarding the decree as an entirety, it is held to be intended to provide that sums due to the trust company individually should be deducted from the total sum to be received by it as trustee from the proceeds of judicial sales of the land, and to follow the findings in that respect.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Mullany, Grant & Cushing, for Appellant.

Warren Olney, Jesse W. Lilienthal, Warren Olney, Jr., Page, McCutchen & Knight, Page, McCutchen, Harding & Knight, James L. Crittenden, N. D. Anderson, E. S. Pillsbury, Wm. H. Chapman, Maguire & Gallagher, Bishop & Wheeler, Chas. S. Wheeler, Wilson & Wilson, Charles W. Willard, and Edgar D. Peixotto, for Respondents.

SLOSS, J.—On January 5, 1891, Leland Stanford conveyed to James P. McCarthy a tract of land containing 589.03 acres, situate in the outskirts of the city of San Francisco. In consideration of the transfer McCarthy gave Stanford four promissory notes, two for fifty thousand dollars each and two for one hundred and twelve thousand five hundred dollars each, and secured the payment of the notes by a mortgage of the land conveyed.

On the first day of April, 1891, McCarthy conveyed to the Sunnyside Land Company about two hundred acres of said tract, the portion so conveyed being known as "The Sunnyside." The consideration for this conveyance was the agreement of the Sunnyside Land Company to pay four hundred thousand dollars, one hundred thousand dollars of which was paid in cash and three hundred thousand dollars was secured

by a mortgage upon the two hundred acres so conveyed. The Sunnyside Land Company thereupon had "The Sunnyside" surveyed and divided into blocks and lots, which were delineated upon a map of "The Sunnyside," filed in the recorder's office. On July 6, 1891, McCarthy conveyed to William M. Fitzhugh the undivided half of the indebtedness due him by the Sunnyside Land Company and of the mortgage given to secure the same. On the fifth day of February, 1892, there was executed by the Sunnyside Land Company, as party of the first part, James P. McCarthy and William M. Fitzhugh, as parties of the second part, and the California Title Insurance and Trust Company, as party of the third part, an instrument in writing, which is referred to in the record as "Trust No. One." Briefly stated, this agreement, certain provisions of which will be set forth more in detail hereafter, provided that the mortgage of three hundred thousand dollars, given by the Sunnyside Land Company to McCarthy was canceled, and all the lands embraced therein, excepting those which had been sold by the Sunnyside Land Company, were bargained, sold, and conveyed by the land company and by McCarthy and Fitzhugh to the California Title Insurance and Trust Company upon these trusts: That the Sunnyside Land Company should proceed with due diligence to make sales of said tract of land at such prices and upon such terms as it should deem advisable, but in no case under certain minimum prices which were set forth in the instrument, and when purchasers should be found, the said Title Insurance and Trust Company and the said Sunnyside Land Company should make a deed of the property sold, and the proceeds of the sales less seven and a half per cent thereof, which should be retained by the land company to cover the expenses of advertising and selling, should be received by the Title Insurance and Trust Company, and applied by it in payment of the Stanford mortgage, and then in payment of the balance due McCarthy and Fitzhugh on the canceled mortgage. After the payment of the foregoing amounts, together with certain expenses incidental to the discharge of the trust, reconveyance should be made to the Sunnyside Land Company of all the lands not sold. It was provided by this instrument, as it had been provided by the mortgage from the Sunnyside Land Company to McCarthy, that the land company should not be

required to make payment of any part of the moneys so owing by it from any source other than from sales of the said tract of land. The Title Insurance and Trust Company was authorized to make advances to pay claims affecting the property covered by the instrument, and was given a first lien security upon "The Sunnyside" for the repayment of all such advances, with interest. The Title Insurance and Trust Company, however, did not obligate itself to make such advances. The land company was given the option of making payments at any time from other sources than from sales.

On January 3, 1893, there was due and payable to Stanford \$81,523.24 on account of one of the notes given by McCarthy. Stanford demanded payment of the amount due, and neither McCarthy nor Fitzhugh nor the Sunnyside Land Company was able to make payment. Under these circumstances the Title Insurance and Trust Company, and certain other persons interested, agreed to advance \$31,523.24, and the Title Insurance and Trust Company, at the request of the Sunnyside Land Company, McCarthy, and Fitzhugh, induced Wells, Fargo & Company to advance fifty thousand dollars, making the \$81,523.24 required to discharge the Stanford indebtedness. At the time of the advance of the fifty thousand dollars by Wells, Fargo & Company, an agreement was entered into by the Sunnyside Land Company, as party of the first part, Wells, Fargo & Company as party of the second part, California Title Insurance and Trust Company as party of the third part, McCarthy and Fitzhugh as parties of the fourth part, and the Stanford Addition Land Company (successor in interest of McCarthy and Fitzhugh in part of the lands purchased by McCarthy) as party of the fifth part. This instrument provided that in consideration of the advance by Wells, Fargo & Company, the Sunnyside Land Company agreed to pay Wells, Fargo & Company or order the sum of fifty thousand dollars within three months, with interest at the rate of ten per cent per annum, and further agreed that the said fifty thousand dollars should be used to discharge the lien of the Stanford mortgage as to "The Sunnyside," and that Wells, Fargo & Company should be subrogated to the rights of Stanford under the said mortgage, and should have the first lien upon said real property, and upon all property and proceeds of the securities and evidences of debt received by

the California Title Insurance and Trust Company under Trust No. One. The Sunnyside Land Company executed its promissory note to Wells, Fargo & Company for fifty thousand dollars, in accordance with this agreement. Wells, Fargo & Company paid Stanford the said fifty thousand dollars, and Stanford released the lien of his mortgage upon "The Sunnyside."

Thereafter sales were made of lands belonging to the Sunnyside Land Company in accordance with the provisions of Trust No. One, and from the proceeds of these sales payments were made to Wells, Fargo & Company until, on March 29, 1897, the balance due was reduced from fifty thousand dollars to fifteen thousand nine hundred dollars. At that time Wells, Fargo & Company was insisting upon payment, and threatening a foreclosure under its agreement of January 3, 1893, and in order to prevent such foreclosure suit, at the request of the Sunnyside Land Company, the California Title Insurance and Trust Company paid Wells, Fargo & Company said fifteen thousand nine hundred dollars, and took from Wells, Fargo & Company an assignment of the indebtedness due under the agreement of January 3, 1893. This indebtedness was then evidenced by a new note of the Sunnyside Land Company to Wells, Fargo & Company. On October 12, 1899, the California Title Insurance and Trust Company executed an instrument transferring and assigning to the Anglo-Californian Bank, Limited, said claim (and note) for fifteen thousand nine hundred dollars, together with the security agreement of January 3, 1893, and on the 8th of November, 1899, the Anglo-Californian Bank transferred this claim, note, and agreement to John B. Earle, the plaintiff in this action.

The plaintiff instituted this action on November 13, 1899, alleging substantially the foregoing facts, and sought to recover the sum of fifteen thousand nine hundred dollars with interest, and to foreclose his lien on so much of "The Sunnyside" as had not been sold to *bona fide* purchasers. The complaint named as defendants the Sunnyside Land Company, California Title Insurance and Trust Company, and a number of other persons who are alleged to claim some interest in the land. All of these other parties derive whatever interest they may have from McCarthy and Fitzhugh.

The California Title Insurance and Trust Company appeared and filed a cross-complaint in which, in addition to showing the transactions hereinabove stated, it set out in full the instrument described as Trust No. One. It may be well at this point to state more fully some of the provisions of that instrument. Paragraph 5 reads as follows: "It is further provided that the said party of the first part (Sunnyside Land Company) shall be entitled to make payments in any amount to said party of the third part (California Title Insurance and Trust Company) on account of the indebtedness hereby secured to be paid and to have said payments applied toward the release of such hereinabove described lands, as said party of the first part may designate, from the lien of said mortgage to Leland Stanford; but it is understood that the sum hereby secured to be paid shall be and is to be paid (except under the said option) only from the proceeds of the sales made by the said party of the first part of the lands hereinabove described, and that said parties of the second and third parts will not require the payment thereof from any other source. The said party of the first part, however, agrees to use reasonable diligence in placing said lands upon the market and in making sales thereof in subdivisions of lots or blocks as said lots and blocks are delineated and designated upon a certain map entitled 'Sunnyside,' owned by the Sunnyside Land Company, and filed in the office of the recorder of said city and county, on the 6th day of April, 1891, such sales to be by it made at such prices and upon such terms as it may deem beneficial and profitable, but at prices not less per block than those designated in the hereinafter mentioned 'Schedule B.' . . ." Paragraph 10 reads: "In case the said party of the third part shall at any time advance, or cause to be advanced by any person or persons or corporation sums of money for the purpose of making payments upon the said mortgage to Leland Stanford, or to any other person or persons or corporation to whom the said party of the third part is hereby directed or permitted to make payments of money, such payments out of the money so advanced shall, except where herein otherwise provided, be deemed to have been made for the benefit of the said parties of the second part (McCarthy and Fitzhugh) and the said party of the third part shall as between the said parties of the second and

third part, immediately become subrogated *pro tanto* to all the rights and privileges of the said party of the second part under this deed and assignment of trust; and this deed and assignment of trust shall be and constitute, as between the said parties of the second and third parts, a first lien security in favor of said party of the third part for the repayment of all such advances, together with interest thereon at the rate of 9 per cent per annum." In addition it may be noted that paragraph 2 of the instrument provides that "this deed and assignment of trust is made to secure the payment, as herein provided, to the said parties of the second part of the sum of \$226,742.76, together with accrued interest. . ."

The cross-complaint of the California Title Insurance and Trust Company alleges that at the time of filing the cross-complaint there remained unpaid and due from the Sunnyside Land Company to the cross-complainant, as trustee on account of the principal sum secured to be paid by said Trust No. One, the sum of \$111,198.63, together with the sum of \$36,552.17 for interest. It alleges further that the said Sunnyside Land Company "has at all times failed and neglected to use reasonable, or any diligence in placing the lands herein designated as 'The Sunnyside' upon the market, and making sales thereof in subdivisions of lots or blocks, as said lots and blocks are delineated and designated upon such map of Sunnyside or any other subdivisions or at all." The cross-complaint asks for a decree that the property be sold to pay the amounts due the cross-complainant under the trust-deed.

The answers of the Sunnyside Land Company to the complaint and the cross-complaint raise no material issue that need here be considered beyond the denial of the allegation of the cross-complaint that the land company had failed and neglected to use reasonable or any diligence in making sales of the lands.

After a trial the court made its findings of fact, in which it found, among other things, that "said Sunnyside Land Company has at all times since the execution of said Trust No. One failed and neglected to use reasonable or any diligence, in placing the lands herein designated as 'The Sunnyside' upon the market and in making sales thereof in subdivisions of lots or blocks, as said lots and blocks are delineated and designated upon the said map of 'Sunnyside,' or any

other subdivisions, or at all," and that "the prices which said Sunnyside Land Company placed and maintained on the unsold and unconveyed lots in said Sunnyside tract, and which it sought and tried to obtain for the same after the execution of said Trust No. One, were and are excessive and prohibitory, and were and are largely in excess of the prices that were obtainable in the open market, and largely in excess of the minimum selling price set forth in 'Schedule B' annexed to said Trust No. One."

Upon the findings the court made its decree, in which it decreed that there was due the plaintiff from the Sunnyside Land Company upon the promissory note of March 26, 1897, for principal, interest, and attorneys' fees the sum of \$21,608.64, which, with plaintiff's costs, constituted a first lien upon the lands described in the complaint; that there was due the California Title Insurance and Trust Company, as trustee, from the Sunnyside Land Company for principal and interest secured to be paid by the instrument known as Trust No. One, the sum of \$165,627.71, which constituted a valid lien upon said lands and premises; that said lands, or so much thereof as might be sufficient to raise the sums declared to be due the plaintiff and cross-complainant, together with interest thereon and costs subsequently accruing, be sold at public auction in the manner prescribed by the law on foreclosure of mortgages by a commissioner appointed by the court, and that the commissioner, after the expiration of the time for redemption, execute a deed or deeds to the purchaser or purchasers at said sale, and that the commissioner out of the proceeds of said sale, after retaining his commissions and disbursements, pay first to the cross-complainant, California Title Insurance and Trust Company, the amount sufficient to redeem the said lands from all tax-sales to the state; second, that said commissioner out of said proceeds pay to the plaintiff the sums declared to be due to said plaintiff, and, third, that said commissioner pay to the cross-complainant, California Title Insurance and Trust Company, the balance of the sums declared to be due to it as trustee from said Sunnyside Land Company under said Trust No. One. Any surplus remaining is directed to be paid to the defendant, the Sunnyside Land Company. The decree then goes on to designate the amounts due to the California Title Insurance and Trust Company

individually, and payable out of the amount to be received by it, and decrees that the defendants other than the Sunnyside Land Company and the California Title Insurance and Trust Company have no interest in the lands except such right as they may have in moneys received by the California Title Insurance and Trust Company as trustee for them.

The Sunnyside Land Company made a motion for a new trial, which was denied, and now appeals from the judgment and from the order denying its motion for a new trial.

While the transactions which gave rise to this controversy are somewhat involved and complicated, the questions to be considered upon these appeals are neither numerous nor difficult. The principal contention of the Sunnyside Land Company is based upon the provision found in Trust No. One to the effect that the sum secured to be paid is to be paid only from the proceeds of sales made by said land company of the lands covered by the trust-deed, and that the other parties to the instrument will not require the payment thereof from any other source. From this provision it is argued that the respondents—i. e. the plaintiff and the California Title Insurance and Trust Company—agreed to look for their payment only to the proceeds of such sales to be made by the Sunnyside Land Company, and that they have no right to seek or enforce payment in any other way. But we think that this argument is based upon too narrow a construction of the provisions of paragraph 5 of the trust-deed. That paragraph provides in addition to the agreement that the payment of the sums due is not to be required from any other source than sales of lands, the undertaking that the Sunnyside Land Company is to use reasonable diligence in placing said lands upon the market and in making sales thereof, such sales to be by it made at such prices and upon such terms as it may deem beneficial and profitable, but at prices not less per block than those designated in a schedule attached to the deed. These provisions are all to be read together, and it certainly could not have been the intention of the parties that the Sunnyside Land Company should, by violating its agreement to use reasonable diligence in making sales, have the power to indefinitely or perpetually postpone the right of the creditors to obtain payment of their claims out of the land which was by the deed of trust made security, and the

only security, for such claims. The cross-complainant alleged and the court found that the Sunnyside Land Company had failed to use reasonable diligence in making sales of these lands. This finding is attacked by the appellant as unsustained by the evidence. We do not intend to restate or even to summarize the many pages of testimony appearing in the transcript upon both sides of this question, but shall content ourselves with saying that, in our judgment, the evidence was ample to support the finding. This being so, can it be said that paragraph 5 of the deed of trust contemplated that the party of the first part, which had agreed to use reasonable diligence in selling these lands, could violate this clause of the agreement, and still stand upon the connected clause providing that no payments were to be made except out of its sales? The case presents a close analogy in principle to the decisions holding that where there is an agreement to pay a sum of money out of the proceeds of a particular fund to be realized by some act of the party who is to make the payment, the act must be performed by him within a reasonable time, and if he fails to perform this duty the sum is payable without reference to the performance of the condition. In *Sears v. Wright*, 24 Me. 278, the action was brought upon the defendant's agreement to pay a certain sum of money from "the avails of the logs bought of Martin Mower, when there is a sale made." It was contended that as the logs had not been sold there was no obligation, but the court, finding that a reasonable time for a sale had elapsed, refused to recognize the defense, saying: "By the terms of that contract it could not be inferred, that the plaintiff had consented to subject himself to any such contingency. His agreement in terms was to wait till the logs could be sold. Thus the defendants had a duty to perform. They were bound to sell the logs and do it within a reasonable time. A reasonable time for such purpose had long since elapsed." In *Nunez v. Dautel*, 19 Wall. 560, the action was upon obligations promising to pay "as soon as the crop can be sold or the money raised from any other source." The suit was instituted more than five years after the date of the instrument. It was held that the plaintiff was entitled to recover without proof that the crops had been sold or the money raised from any other source, the court saying: "No time having been specified within which the crops should

be sold or the money raised otherwise, the law annexed as an incident that one or the other should be done within a reasonable time, and that the sum admitted to be due should be paid accordingly. Payment was not conditional to the extent of depending wholly and finally upon the alternatives mentioned. The stipulation secured to the defendants a reasonable amount of time within which to procure in one mode or the other the means necessary to meet the liability. Upon the occurrence of either of the events named or the lapse of such time, the debt became due. It could not have been the intention of the parties that if the crop were destroyed, or from any other cause could never be sold, and the defendants could not procure the money from any other source the debt should never be paid. Such a result would be a mockery of justice. . . . When the suit was instituted more than five years had elapsed from the date of the instrument. This was much more than a reasonable time for the fulfillment of the undertaking of the defendants, and the plaintiff was entitled to recover." In *Williston v. Perkins*, 51 Cal. 554, the defendants, who were engaged in building a vessel, gave to their laborers certificates providing that the payees were entitled to receive specified sums, "when the three-masted schooner now in course of construction by said association is sold." Action was brought upon these certificates before the vessel had been sold. The trial court found that the defendants did not make an honest effort to sell the vessel at its market value and gave judgment for the plaintiff. The judgment was affirmed on appeal, the court saying: "The defendants were entitled to only reasonable time in which to finish and sell the schooner, and that time having elapsed, the plaintiff could maintain his action." (See, also, *Bryant v. Saling*, 4 Mo. 522; *Ubsdell v. Cunningham*, 22 Mo. 124; *Hicks v. Shouse*, 17 B. Mon. (Ky.) 483; *Wilder v. Sprague*, 50 Me. 354; *DeWolfe v. French*, 51 Me. 420; *Crocker v. Holmes*, 65 Me. 195, [20 Am. Rep. 687]; *Noland v. Bull*, 24 Or. 485, [33 Pac. 983].)

In nearly all of these cases the literal reading of the contract was merely that the payment should be made upon the sale of certain property or the performance of some act by the defendant. The court, however, in each instance had no difficulty in reading into the contract an obligation on the

part of the defendant to use reasonable diligence to perform the act, upon the completion of which the payment was made contingent, and in the event of his failure so to do in requiring payment without the performance of the condition. The present case is stronger than any of those cited in that here the Sunnyside Land Company agrees in terms to use reasonable diligence in placing said lands upon the market and in making sales thereof.

It is true that this case differs from those cited in that here, under the express provisions of Trust No. One, a personal liability could not be imposed upon the Sunnyside Land Company. Nor was it attempted to impose such liability. But by the instrument in question the "deed and assignment of trust" was made a "first lien security" in favor of the Title Insurance and Trust Company for the repayment of all advances, and was also made to secure the payment to McCarthy and Fitzhugh, through the title company, of the purchase price not yet received by them. The payment of these sums being thus secured by the land, we are satisfied that upon the failure of the land company to use the required diligence to make sales, a court of equity was authorized to subject the security to the payment of the claims of the plaintiffs and the cross-complainant by some appropriate method, such as the method here adopted.

The appellant lays much stress upon the provision in paragraph 5 of the deed of trust that sales are to be made by it at such prices and upon such terms as it may deem beneficial and profitable, but at prices not less per block than those designated in the schedule. The provision for minimum prices is no doubt inserted for the protection of the parties other than the Sunnyside Land Company. It is a restriction upon the right of the land company to fix prices according to its pleasure. But it is not the only restriction on this right. The clause giving the right to fix prices must be read in connection with the covenant to use reasonable diligence to make sales, and in the light of the general purpose of the trust agreement. The object which the parties had in view was that the lands should be disposed of to the ends—1. That the claims against the lands should be discharged; and 2. That the land company should realize a profit either in money or in lands remaining unsold after payment of the indebtedness. It was

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never intended that the Sunnyside Land Company should have an arbitrary and unfettered power to fix prices which would make any sales impossible and would for an indefinite time prevent the accomplishment of the purposes of the trust.

In this discussion we have treated the plaintiff's case and that of the California Title Insurance and Trust Company as standing on the same grounds—viz. that both are based on claims secured by the terms of Trust No. One. But, so far as the plaintiff is concerned, the relief granted by the decree finds other support. The plaintiff is the assignee of the agreement of January 3, 1893, under which Wells, Fargo & Company made an advance of fifty thousand dollars. In this agreement the Sunnyside Land Company stipulated that Wells, Fargo & Company should be subrogated to the rights of Stanford under the original mortgage. The plaintiff, as the holder of a part of the indebtedness, and assignee of the agreement, succeeded to this right of subrogation, and is, by virtue of it, entitled to a decree of foreclosure. His rights are in no wise affected by the fact that the Wells, Fargo & Company note passed through the hands of the California Title Insurance and Trust Company. There was nothing in the relations of trust created by "Trust No. One" which prevented the title company from advancing the money required to pay off Wells, Fargo & Company, and taking the security which had been held by Wells, Fargo & Company. The advance was made to prevent a threatened foreclosure, and in making it the title company was not required to surrender any part of the security for the claim assigned to it.

It is argued by the appellant that the instrument known as Trust No. One attempts to create a trust for purposes not authorized by section 857 of the Civil Code, and that for that reason the entire instrument is void. We do not think it necessary in this case to determine whether the instrument in question was a valid trust-deed so as to convey the legal title to the California Title Insurance and Trust Company. If it was not a valid trust-deed, there can be no difficulty in sustaining the instrument as an equitable mortgage or lien. As this court has said, in *Higgins v. Manson*, 126 Cal. 467, [77 Am. St. Rep. 192, 58 Pac. 907], quoting the rule as stated in *Howard v. Iron etc. Co.*, 62 Minn. 298, [64 N. W. 896], "Every express agreement in writing whereby the party

clearly indicates an intention to make some particular property therein described a security for a debt, creates an equitable lien upon the property, which is enforceable. The form of the writing is not important, provided it sufficiently appears that it was thereby intended to create a security. If that intention appears, it will create a mortgage in equity or a specific lien upon the property so intended to be mortgaged." In a case like this where the parties have entered into a written agreement, of whatever form, intended to make certain property a security for past indebtedness and for future advances, and have acted upon the faith of that agreement in making and accepting such further advances, we should be slow to adopt any construction which would result in invalidating the entire transaction and depriving the creditor who has advanced his money in good faith of any remedy for its recovery. No policy of the law is violated by treating this instrument as creating a lien in the nature of a mortgage, if it cannot be upheld as a deed of trust. Whether it be the one or the other, we do not doubt the power of a court of equity to direct the sale of the security for the discharge of the debt, at least where the instrument itself furnishes no available method of realizing on the security.

We cannot agree with the contention of the appellant that the judgment should have directed that the sales be made at figures not less than the minimum prices set forth in the trust agreement. This provision for minimum sales was, as we have said, inserted for the benefit of the creditors. Furthermore, it was a part and parcel of the general scheme for the sale of the lands by the Sunnyside Land Company itself. When, by reason of its neglect to perform its duty, the Sunnyside Land Company produced a condition which authorized a court of equity to take the security into its hands for the purpose of realizing the sums for which it was liable, the provision for minimum prices fell with the provision authorizing the land company to make the sales, and the court was authorized to direct a sale in any just and equitable manner. We see no objection to the manner that is here adopted.

The point is made that the judgment does not follow the findings in that it authorizes payment to the California Title Insurance and Trust Company of amounts due to it individually, in addition to the sum of \$165,627.71, payable to it as

trustee. Reading the decree as an entirety, there can be no question that it intended to provide and did provide that the sums due to the California Title Insurance and Trust Company individually should be deducted from the total sum of \$165,627.71 to be received by it from the proceeds of the sales.

We find no prejudicial error in any rulings made by the court upon the admission or rejection of evidence, nor is any other point made by the appellants that requires notice.

The judgment and order appealed from are affirmed.

Angellotti, J., Shaw, J., McFarland, J., and Lorigan, J., concurred.

[S. F. No. 3842. Department Two.—January 9, 1907.]

MEBIUS & DRESCHER COMPANY, Appellant, v. **REGINALD MILLS et al.**, Individually, and as Copartners, Respondents.

CONTRACT FOR PURCHASE OF SALT—ACTION FOR BREACH—RULING AS TO IMMATERIAL EVIDENCE—EXCLUSION OF CONTRACT—AMENDMENT—SECOND OFFER UNNECESSARY.—In an action for damages for breach of a contract showing the purchase of a quantity of salt, under a scale of prices fixed according to quality, to be ordered for shipment before a time fixed, where the court ruled that the contract should be excluded from evidence, as being an executed contract which was void for incompleteness, want of materiality, and uncertainty, and allowed an amendment setting forth the specific orders made for the delivery of salt at a certain price, but declaring at the same time that no amendment of the pleading would affect its construction of the contract, no second offer of the contract was necessary after such amendment and declaration by the court. The law does not require the doing of vain things.

ID.—PROOF OF EXECUTION OF CONTRACT—SIGNATURE BY PLAINTIFF CORPORATION—AUTHORITY OF PRESIDENT—ADMISSION OF PLEADINGS.—Where the execution of the contract was sufficiently proven against the defendants sought to be charged, no proof of the authority of the president of the corporation to sign the contract for it is necessary, where no issue was raised as to his authority, which was alleged in the complaint; and an alleged demand by plaintiff corporation for a fulfillment of the contract showed a ratification of the president's signature, rendering proof of his authority unnecessary.

ID.—PARTNERSHIP OF DEFENDANTS—VARIANCE—QUESTION FOR JURY.—

If any variance existed between the complaint and the evidence as to the partnership of the defendants, without deciding that it did exist, the question as to such variance was one for the jury, and the court would not be justified on that ground in summarily withdrawing the case from the consideration of the jury by an instruction to find for the defendants.

ID.—CONSTRUCTION OF CONTRACT—ERROR OF COURT.—Applying the proper principles for the construction of contracts, the court erred in holding the contract to be an executed contract, which was void for the reasons assigned. It does not evidence a completed sale, which would be open to the objections of uncertainty and want of mutuality; but at the most it is an executory contract of sale, and at the least an option to purchase good until withdrawal, and binding if the option was exercised before withdrawal.**ID.—EXECUTORY CONTRACT—OBLIGATIONS AND RIGHTS OF PARTIES.—**

Treating the contract as an executory contract of sale, plaintiff had bound itself to take a specified quantity of salt, and had a specified time in which to select the kinds or one kind of salt which it would use, the prices thereof being fixed, and defendants had bound themselves to supply this salt at those prices as delivery of the same should be demanded during the time fixed. If plaintiff failed to take that quantity of salt of a specified kind or kinds by the time fixed, it would be the right of the defendant salt company to have insisted upon plaintiff taking such kind and quality of salt as would be most advantageous to it.

ID.—OPTION TO PURCHASE—ACCEPTANCE.—Treating the contract as an option to purchase, the legal effect is not different. Not having been withdrawn, it became binding upon an acceptance evidenced by the demand for the shipment of the quantity and kind of salt ordered under the terms of the contract within the time limited and the offer to pay the agreed price therefor.**ID.—CERTAINTY OF CONTRACT—CODE MAXIM.—**The maximum amount of quantity being fixed by the contract, the uncertainty as to the quantity and quality of particular kinds of salt which might be chosen is not the kind of uncertainty which renders an executory contract unenforceable. The agreement is relieved of uncertainty when the choice is exercised; and such contracts come within the maxim embodied in section 3538 of the Civil Code, that "that is certain which can be made certain."**ID.—CONSTRUCTION UPHOLDING CONTRACT PREFERRED.—**There being two permissible constructions of the contract in question which fairly express the meaning of the parties and which make a valid and binding instrument, and if it be conceded that a construction making the contract an executed sale is possible, under which it would be invalid, then the rule must be applied that a construction which establishes a valid contract is to be preferred to that which does not.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

W. F. Williamson, Wm. E. Kleinsorg, and Albert M. Johnson, for Appellant.

Walter M. Willett, Louis Titus, H. M. Wright, and Franklin P. Bull, for Respondents.

HENSHAW, J.—Plaintiff sued defendants individually and as copartners doing business under the name of The Russell and Mount Eden Salt Company, for damages for breach of contract for failure to deliver salt in accordance with the demand of plaintiff, under the terms of a written contract between the parties. Trial was had before a jury. The preliminary proofs were made and the contract offered in evidence. The court refused its admission upon the ground of its incompleteness and uncertainty, treating the writing as an executed contract of sale. Plaintiff contended that the contract should be construed as an executory contract of sale, or as an option of purchase, which option had become effectively binding upon defendants by subsequent orders for the delivery of salt made upon defendants within the time prescribed in the contract. It sought and obtained leave to amend its complaint by showing the specific orders for salt which it had made upon defendants pursuant to its agreement, and the court permitted these amendments to be made. In so doing, however, the court declared that no change in pleading could affect its construction of the contract, which it regarded as void for uncertainty. Upon this the case was submitted without a second offer of the contract, and the jury, under instructions from the court so to find, gave its verdict for defendants, and plaintiff appeals.

Certain preliminary and minor objections are presented by respondents,—viz. that the principal question, that of the construction of the contract, cannot here be considered, for the reason that after the amendment to the complaint the contract should have been offered in evidence again, and that this was

not done, and that upon the condition of the pleadings at the time when the contract was offered the court's ruling was correct. A second offer of the contract would have been inutile under the declaration of the trial judge, that no amendment to the pleadings could affect his construction of the contract. The law does not require the doing of vain things, and a second offer, under the circumstances disclosed in the record, was not necessary.

Of the objection that the contract when offered was not proved to have been signed by the president of plaintiff corporation, it is sufficient to say that the execution of the contract was sufficiently proved against the defendants, who were the parties sought to be charged. No issue was raised as to the authority of the president to sign, though his authority is alleged in the complaint, and the demand upon the part of plaintiff corporation for a fulfillment of what it conceived to be the terms of the contract was a sufficient ratification to have made proof of the original signing by plaintiff unnecessary. Upon the question of a variance between the allegations and proofs touching the partnership, if it be conceded that such variance exists, a question which it is not necessary to decide, and which is therefore not decided, this would not have justified the summary withdrawal of the case from the consideration of the jury by the instruction to find for the defendants which was given them by the court. It would have been for the jury, after all, to say whether plaintiff should have failed because of the asserted variance. Moreover, the case was taken from the jury, as has been said, by the refusal of the court to admit in evidence the contract, which was vital to appellant's case, and by its subsequent instruction to the jury to find for the defendants. The paramount question in the case, therefore, is the construction of the paper writing between the parties.

Plaintiff's business was that of a merchant selling salt and other merchandise. Defendants were manufacturers and sellers of salt. Upon June 23, 1900, the parties entered into the following agreement:—

“SAN FRANCISCO, CAL., June 23rd, 1900.

“**MEBIUS & DRESCHER Co.,**

“Sacramento, Cal.,

“Bought of the Russell and Mount Eden Salt Company,
Dealers in Salt of all kinds. A. L. Lundy, Manager. 226
Clay St.

“Salt Works,

“Alameda County, Cal.

Subject to sight draft

“Capacity, 15,000 Tons per annum.

if not paid when due.

“750 Tons of Salt—

“Table Salt in Bales any size.....\$1.02½

“Dairy Salt in 50-lb Cotton sacks..... 7.00

“Im’t. Liv. Salt Wellington Brand 50’s..... 9.25

“ “ “ “ “ 100’s..... 8.75

“ “ “ “ “ 230’s..... 8.25

“Half Ground Salt 50’s..... 4.25

“ “ “ “ 100’s..... 4.00

“Coarse Salt 50’s..... 3.90

“ “ “ “ 100’s..... 3.65

“The above prices are f. o. b. Sacramento, excepting such quantities as the buyers may direct shipped by rail from Hayward Station, in which case a rebate of 75 cents per ton will be allowed.

“All the above salt to be ordered shipped before January 1st, 1902. The sellers are to be allowed a reasonable time for making shipment. Shipments are to be made in not less than 100-ton lots, excepting from Hayward station in car-load lots.

“**THE RUSSELL AND MOUNT EDEN SALT Co.,**

“By A. L. LUNDY, Manager.

“Accepted:

“**Mebius & Drescher Co.,**

“By P. C. Drescher, President.”

Upon the eighteenth day of December, 1900, plaintiff demanded of the defendants the delivery of one hundred and eleven tons of table salt under this agreement, offering to pay therefor the rate specified in the above contract. On the fifteenth day of May, 1901, plaintiff made further demand upon defendants for six hundred and thirty-nine tons of table salt, then and there offering to pay at the rate specified in the

above contract. Defendants refused to comply with these demands, or to fill any part of the order. Plaintiff then served notice that upon such refusal they would be compelled to purchase the salt in open market, and would hold defendants responsible for the difference between the contract price and that which they were compelled to pay. These facts present the gist of the present action.

As has been said, the trial court insisted upon treating the agreement as an executed contract of sale, void for uncertainty and lack of mutuality, and refused to regard it from any other view-point, or to consider it at all in connection with the subsequent demand made by plaintiff, within the time limited in the memorandum, for a delivery of certain specified quantities of salt, bought at the price and in the manner and under the terms set forth in the agreement. In this we think the court was misled into taking too narrow a view of the question, and, in particular, in considering itself bound to treat the contract as an executed contract of sale by reason of the statement contained therein, "*Mebius & Drescher Company bought of the Russell and Mount Eden Salt Company 750 tons of salt.*" While it is true that parol evidence may not be permitted to vary the terms of a written contract, it is equally true that in construing a contract all parts of it are to be considered, and the circumstances surrounding its making to be regarded, with a view of arriving at the true intent of the parties. Nor, is it the name parties may give to their contract which determines its character. That is to be determined from a critical inspection and analysis of the whole instrument. So reading this instrument, it becomes apparent that it does not evidence a completed sale, wherein it would be open to the objection of uncertainty and lack of mutuality which the court put upon it, but that, at the most, it was an executory contract of sale, and, at the least, an option of purchase, good until withdrawal, and binding if the option were exercised before withdrawal. Treated as an executory contract of sale, plaintiff had bound itself to take seven hundred and fifty tons of salt. It had until January 1, 1902, in which to select the kinds of salt which it would use, the prices thereof being fixed, and defendants, upon the other hand, had bound themselves to supply this salt at those prices as delivery should be de-

manded during the time fixed. Certainly this is a perfectly reasonable contract for a salt merchant to enter into with a salt manufacturer. If Mebius & Drescher failed to take seven hundred and fifty tons of salt of specified kinds by January 1, 1902, it would have been the right of the Russell and Mount Eden Salt Company, since there had been a failure to exercise the right of choice, to have insisted upon their taking such kind and quality of salt as would have been most advantageous to it. And Mebius & Drescher, under such circumstances, could not have been heard to complain if they were hurt by their own remissness in exercising the right of selection which had been given to them. Upon the other hand, the Russell and Mount Eden Salt Company clearly bound themselves to furnish seven hundred and fifty tons of salt under orders of not less than one-hundred-ton lots, at prices fixed by their agreement, of any or of all the kinds set forth in the memorandum. It was therefore competent and proper for Mebius & Drescher to have ordered salt of several different kinds, or, depending upon the condition of the market and their opportunity to make advantageous sales, to have ordered all of the salt of one kind, as they did. Nor of this could the defendants be heard to complain, since, if they had not been willing to furnish all the salt of one or another quality, it was a perfectly simple matter for them to have had the contract so declare, and to have provided a maximum amount of each quality which could be ordered. So much for the contract as an executory contract of sale. Mebius & Drescher, having exercised their right of selection within the time limited by contract, it became the clear duty of the defendants to ship to them the seven hundred and fifty tons of table salt ordered in accordance with the terms of the contract.

But, treating the contract as a mere option, the legal effect is no different. As an option of purchase it held good until withdrawn, and became binding upon acceptance. The acceptance was evidenced by the demand for the shipment of salt and the offer to pay, all in accordance with the terms of the contract, and it is not pretended that there was any withdrawal before this acceptance. There are thus, at least, two permissible constructions of this contract, which may be said fairly to express the meaning of the parties, and which make

it, in the eye of the law, a valid and binding instrument. If it even be conceded that the third construction, that of an executed contract of sale, which the trial court adopted, is equally permissible, then must be invoked the familiar rule of construction that as between two permissible constructions, that which establishes a valid contract shall be preferred to that which does not, since it is reasonable to suppose that the parties meant something by their agreement, and were not engaged in an attempt to do a vain and meaningless thing. The uncertainty as to the quality and quantity of salt which might be ordered under the contract is not the uncertainty which renders such contracts invalid. The maximum amount was fixed by the order. There was no uncertainty in that sense as to quantity. It is uncertainties of this latter kind, where it cannot be determined whether it was a pound or a thousand tons, a peck or a million bushels, that have justly been held to render contracts unenforceable in law. But here the maximum amount which the seller could be called upon to deliver, and the purchaser be called upon to take, was absolutely fixed, and it may not be said that, because a certain play of discretion as to quality was allowed within that limit, this discretion introduced an element of uncertainty which would invalidate the contract. Reduced to simpler terms, if a man should say to a seller, "I will take from you three dozen pocket-knives of one or all of three described kinds," the price for each kind being specified, "but I want you to agree to give me a week in which to determine which of the kinds I will select," it would come with some astonishment to a merchant to be told that such an agreement was void in law for uncertainty. It is probably safe to say that a million of such transactions take place every month throughout the country without question or the possibility of question as to the legality of the agreement. The agreement is at once relieved of uncertainty when the choice is exercised, and such contracts come directly within the letter as well as the spirit of the maxim embodied in our Civil Code (sec. 3538), "That is certain which can be made certain." In summing up upon this matter, therefore, we hold this contract to be an executory contract of sale, containing no elements of uncertainty which would render it invalid and imposing a mutuality of engagement upon the parties to it.

It does not fall within the sweep of the condemnation of contracts such as that in *Cold Blast Co. v. Kansas City etc. Co.*, 114 Fed. 77, [52 C. C. A. 25], where there was no specification as to the quantity to be delivered, and which was a mere offer to deliver certain materials at prices stated. The court held there that there was no mutuality, and that there was a vital uncertainty in terms, in that it could not be determined what was the quantity contemplated to be delivered. In *Crane v. Crane Co.*, 105 Fed. 869, [45 C. C. A. 96], the principles to be invoked in construing contracts such as this are well set forth, but the vice in the contract there reviewed was the vice of lack of mutuality, there being no agreement to purchase. In *American Cotton Oil Co. v. Kirk*, 68 Fed. 791, [15 C. C. A. 540], the court expresses the conclusive objection to the contract in the following language: "The time of ordering as well as the quantity was left wholly to the wish of one party, who might drag it over a hundred years." And so, without prolonging the discussion, the same distinction will be found to obtain in all cases upon which respondents rely. Upon the other hand, and as showing that contracts of the nature of the one here in suit, are enforceable in law, and that damages for their breach may be recovered, reference may be made to *Great Northern Ry. Co. v. Witham*, L. R. 9 C. P. 16; *Topliff v. Topliff*, 122 U. S. 121, [7 Sup. Ct. Rep. 1057]; *Cherry v. Smith*, 3 Humph. (Tenn.) 19, [39 Am. Dec. 150]; *Robson v. Miss. Riv. Logging Co.*, 43 Fed. 371; *Wells v. Alexander*, 130 N. Y. 642, [29 N. E. 142]; *Nat. Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427.

For the foregoing reasons the judgment and order appealed from are reversed and the cause is remanded.

McFarland, J., and Lorigan, J., concurred.

[S. F. Nos. 8990, 4356. Department One.—January 9, 1907.]

**EDWARD POLLITZ et al., as Copartners, etc., Appellants,
v. MARY C. WICKERSHAM, Executrix, etc., Respondent.**

ORDER GRANTING NEW TRIAL—BILL OF EXCEPTIONS—REVIEW UPON APPEAL.—If the grounds of the motion for a new trial are such as can be presented only by a bill of exceptions or statement, and the notice calls for a bill of exceptions, and if the bill asked for at the hearing cannot be properly considered, the order should be reversed; but if it can be properly considered, and justifies the order, it must be affirmed.

ID.—FAILURE TO SERVE BILL IN TIME—OBJECTION RESERVED—PRESENTATION UPON SETTLEMENT—LAPSE OF TIME—POWER TO RELIEVE FROM DEFAULT.—Where the proposed bill of exceptions on motion for new trial was not served within the time prescribed by law, and at the time of service objection was reserved on that ground, but the objection was not presented to the court until the bill came up for settlement, one day after the expiration of six months from the time of service, the court had power, upon the presentation of such objection, or within a reasonable time thereafter, upon a proper showing of excusable neglect under section 473 of the Code of Civil Procedure, to relieve the moving party from the default in service.

ID.—CONSTRUCTION OF CODE—"PROCEEDING TAKEN AGAINST" MOVING PARTY.—There was no "proceeding taken against" the moving party within the meaning of the code until the objection was presented by the opposing party to the court as a ground for an order against the moving party. The mere reservation of objection to the service did not constitute a "proceeding" within the meaning of the statute.

ID.—SUPPORT OF ORDER GRANTING NEW TRIAL—PRESUMPTION—OPINION.—Where the order granting a new trial upon the settled bill of exceptions, after the granting of relief from default, was in general terms, not purporting to exclude any grounds stated in the notice, one of which was insufficiency of the evidence to justify the decision, if it is sustainable on that ground, it must be presumed in favor of the order that it was granted for that reason, regardless of any reason stated in the opinion of the trial court.

ID.—DUTY OF JUDGE AS TO NEW TRIAL—EFFECT OF EVIDENCE—PRESUMED CHANGE OF OPINION.—It is the duty of the judge of the trial court to grant a new trial, whenever he is not satisfied with the verdict of the jury, or the findings of the court. He is not bound by the rule as to conflicting evidence; and where insufficiency of the evidence is one of the grounds of the motion it must be presumed

in favor of the order granting a new trial that the court changed its opinion as to the effect of the evidence, and reached a conclusion more favorable to the moving party.

ID.—NEW TRIAL TO DEFENDANT UNDER CROSS-COMPLAINT—SALES OF STOCK UPON MARGIN—REVIEW OF PLAINTIFFS' EVIDENCE.—In an action by stock-brokers to recover moneys advanced upon the purchase and sale of stocks, where a new trial was granted to the defendant upon a cross-complaint alleging that the purchases and sales of stock were upon margin, to be delivered at a future day, in violation of the constitution, the court in determining whether the assailed findings against the defendant were supported by the evidence had the right to consider all the evidence, including that given by plaintiffs in support of their claim, involving the same transactions in respect to which relief was sought by the cross-complaint.

ID.—PROBATIVE FINDINGS NOT CONSIDERED—ADMISSIONS AND EVIDENCE.—The court in determining the sufficiency of the evidence to sustain the findings assailed was not required to consider probative findings not assailed, but the question is to be determined upon the admissions of the pleadings and the evidence given upon the trial.

ID.—SUFFICIENCY OF EVIDENCE TO SHOW SALES UPON MARGIN.—Upon a review of the evidence in the record, it is held sufficient to warrant an inference and to support findings by the trial court that purchases and sales of stock, advances upon which were sought to be received by plaintiffs, were purchased and sold by plaintiffs upon margin to be delivered at a future day, as alleged in defendant's cross-complaint.

ID.—ADMISSIONS IN CLAIM PRESENTED BY PLAINTIFFS.—Admissions made by the plaintiffs in their verified claim first presented against the estate of the deceased testator (after the rejection of which a second claim in different terms was presented, which was sued upon) was admissible, and might be considered by the court as an admission against interest in granting the new trial.

APPEAL FROM JUDGMENT—REVIEW—ERROR IN RECORD AS TO VARIANCE.—Upon appeal from the judgment, it is held to be an error of the court to conclude that there was such a variance between the facts set forth in the second claim, on which the action was brought, and the facts proven by plaintiffs and found by the court, as to preclude a recovery. There was no material variance; but the cause of action established by the findings is the same as that attempted to be set out in the claim and the complaint, neither of which showed a prohibited transaction.

ID.—SUFFICIENCY OF CLAIM AGAINST ESTATE.—A claim against an estate is not required to state the facts with all the preciseness and detail required in a complaint, and its sufficiency is not to be tested by the rules of pleading. The claim in this case was not invalid upon its face.

ID.—REVERSAL OF JUDGMENT—NEW TRIAL.—In reversing the judgment this court has power to order a new trial of the issues between plaintiffs and defendant; and, this court having affirmed an order granting a new trial involving a question of fact as to the validity of the plaintiffs' claim, it is a proper case for granting such new trial rather than to order a judgment for the plaintiffs, which might work an unjust conclusion.

APPEAL from a judgment of the Superior Court of Sonoma County and from an order granting a new trial. Albert G. Burnett, Judge.

The facts are stated in the opinion of the court.

Heller & Powers, Edmund Tauszky, and A. A. Moore, for Appellants.

Lippitt & Lippitt, Campbell, Metson & Campbell, and Thomas H. Breeze, for Respondent.

ANGELLOTTI, J.—This action was one brought by plaintiffs, who were stockbrokers, to obtain a decree adjudging that the estate of Frederick A. Wickersham, deceased, is indebted to them in the sum of \$33,514.55 with interest, for moneys advanced by them in the purchase for said Wickersham of five hundred shares of the stock of the Honokaa Sugar Company, a corporation, and five hundred shares of the stock of the Paauhau Sugar Plantation Company, a corporation, and directing the sale of said stock, together with three hundred and fifty other shares of the Honokaa Company belonging to Wickersham, all of which was alleged to be held in pledge as security by plaintiff, and the application of the proceeds to the debt, and adjudging the payment in due course of administration of any deficiency that may remain after such sale. The original answer contained denials of the allegations of the complaint as to the transaction between plaintiffs and defendant's intestate, but contained no affirmative defense. It, however, included allegations "by way of cross-complaint, and asking for affirmative relief," to the effect that the transaction between the parties was one for the purchase and sale of shares of stock of corporations "on margin, or to be delivered at a future day," and, there-

fore, one within the prohibition contained in section 26 of article IV of our constitution, where it is declared that "All contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." Judgment was asked by defendant declaring the agreement to pay made by Wickersham null and void, and for the recovery of the three hundred and fifty shares of stock held as partial security. By her second amended cross-complaint, the same matters were set up, defendant's prayer, however, being simply for the return of ~~the~~ three hundred and fifty shares, and damages for the detention thereof. Plaintiffs by answer denied the allegations of the cross-complaint in this regard. The findings of the trial court were in favor of plaintiffs upon all the issues made by complaint, answer, cross-complaint and the answer thereto, except upon the single issue as to the presentation to the executrix by plaintiffs before action of their claim against deceased. As to this issue, the trial court included in its findings a copy of the claim actually presented, and concluded therefrom that "the facts proven by plaintiffs herein and found by the court do not correspond with the claim presented by plaintiffs to defendant, and that there is a material variance between the facts as set forth in said claim and . . . in the complaint, and the facts proven by plaintiffs and found by the court." On this ground alone, judgment was given that plaintiffs take nothing, the judgment also being that defendant take nothing by her cross-complaint. Defendant moved for a new trial of the issues of fact arising upon her second amended cross-complaint and the answer of plaintiffs thereto, and an order was made granting such motion. Plaintiffs appeal from that portion of the judgment denying them any relief, and also from the order granting defendant's motion for a new trial. The appeal from the judgment is upon the judgment-roll alone, and the appeal from the order is before us upon the judgment-roll and a bill of exceptions procured by plaintiffs to be settled upon the granting of the motion.

We shall first consider the appeal from the order granting a new trial.

By the bill of exceptions settled for use on this appeal, it is made to appear that the grounds of motion for a new trial were such as could be presented only by a bill of exceptions or statement on motion for a new trial, and the notice of motion stated that the motion would be made solely on the bill of exceptions. If defendant's bill of exceptions, which was used upon the hearing of the motion, could not properly be considered thereon, no reason for a new trial was made to appear, and the order should be reversed.

Defendant's proposed bill of exceptions was not served until some days after the expiration of the time prescribed by law. Plaintiffs at the time of such service reserved the objection that the bill was served too late. The bill came up for settlement on December 5, 1904, which was a few days after the expiration of six months from the time defendant should have served her proposed bill, and one day after the expiration of six months from the time of actual service thereof, June 4, 1904. Plaintiffs objected to the settlement on the ground that the bill had not been served in time. Defendant thereupon made by affidavits a showing for relief, on the ground of excusable neglect, under section 473 of the Code of Civil Procedure, which was met by a counter-affidavit on the part of plaintiffs. The trial court ruled that the default of defendant in preparing and serving the bill was due to excusable neglect, and that a sufficient case had been made to entitle her to relief, and thereupon settled the bill. Objection to the use of the bill was subsequently made on the hearing of the motion for a new trial, and overruled.

The showing as to excusable neglect was such that it cannot be held that the trial court erred in relieving defendant from the effect of her default, if it then had the power to grant such relief. Section 473 of the Code of Civil Procedure, providing that the court may relieve a party "from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect," in terms limits the cases in which such relief may be granted to those wherein the application for relief is made within a reasonable time, and in no case "exceeding six months after such judgment, order, or proceeding was taken." As already noted, the application here was not made until more than six months after defendant's default, and the actual service of the

bill. It is claimed by plaintiffs with much force that the application was in fact for relief *from her failure to serve the bill in time*, and such failure having occurred more than six months before the application, the court was without power to grant the relief. We find, however, that this court has given a different construction to the statutory provision. In holding that relief may be given under section 473 of the Code of Civil Procedure from the effect of the failure to take in time a necessary step in the matter of procuring a bill to be settled, this court, basing its conclusion upon the fact that, under the statute, relief can be had only "from a judgment, order, or other proceeding taken against" a party, has said that the relief sought is from some proceeding taken by the adverse party based upon the default, or from some order of the court based thereon. Thus, in *Stonesifer v. Kilburn*, 94 Cal. 33, [29 Pac. 332], the first case in which section 473 of the Code of Civil Procedure was declared applicable to such matters, it was held that the objection made to a settlement of a proposed bill on the ground that it was not served in time, was a step in the action to obtain the interposition of the court, which amounted to a proceeding against the appellants within the letter and spirit of the section, and that it is from this proceeding that the appellants asked and the court had power to grant relief. In *Banta v. Siler*, 121 Cal. 414, [53 Pac. 935], the application was for relief from an order refusing to settle the statement on objection made thereto, and this court affirmed the action of the trial court in granting such relief and settling the statement. These cases give a construction to the statutory provision that we would not feel justified in departing from, to the prejudice of a litigant who has relied thereon. We see no reason why one who finds himself in default in such a matter may not anticipate the objection or proceeding to be taken against him based thereon, and make his application for relief at once (see *Vinson v. Los Angeles Pac. R. Co.*, 147 Cal. 479, [82 Pac 53]), but, in view of the decisions above cited, we do not feel warranted in holding that the application comes too late, if made at the time the objection based on the default is presented to the court, or within a reasonable time thereafter. We are satisfied that the mere reservation of their objection by plaintiffs at the time of the service of the bill did not

constitute a "proceeding" within the meaning of the statute. We conclude, therefore, that the bill of exceptions was properly settled, and entitled to be considered on the motion for a new trial.

The order granting the motion for a new trial was in general terms, not purporting to exclude any particular ground specified in the notice. One of the grounds specified in the notice was insufficiency of the evidence to justify the decision. If upon the record before us, a new trial could have been properly granted upon that ground, we must assume in favor of the order that it was granted for that reason, regardless of any reason stated in the opinion of the trial court. (See *Schnittger v. Rose*, 139 Cal. 656, 659, [73 Pac. 449]; *Ben Lomond etc. Co. v. Sladky*, 141 Cal. 619, 621, [75 Pac. 332]; *Weisser v. Southern Pacific Co.*, 148 Cal. 426, [83 Pac. 439].) "It is the duty of the judge of the trial court to grant the new trial whenever he is not satisfied with the verdict if tried by a jury, or with the findings, if tried by the court; and he is not bound by the rule as to conflicting evidence, as is this court" (*Condee v. Gyger*, 126 Cal. 546, 547, [59 Pac. 26]; *Churchill v. Flournoy*, 127 Cal. 355, 362, [59 Pac. 791]). Where the evidence is such that it would have sufficiently supported findings in favor of the party against whom the decision was given, and the trial court grants a motion for new trial made upon various grounds, including that of insufficiency of evidence, without in terms excluding such ground in its order entered on the minutes, we must presume, in favor of such order, "that the court changed its opinion as to the effect of the evidence, and reached a conclusion upon the hearing of the motion, favorable" to the party making the motion (*Condee v. Gyger*, 126 Cal. 546, 548, [59 Pac. 26]). As a matter of fact, the opinion of the trial judge filed upon the decision of the motion shows that such was the case here. It is the reason given by the learned judge for such change that counsel for appellant vigorously assail.

The real question in dispute between the parties on the issues made by the cross-complaint and the answer thereto was as to whether the transaction between plaintiffs and Wickersham, upon which each party based its action, was one prohibited by the constitutional provision hereinbefore quoted, and therefore void. The specifications of insufficiency of

evidence contained in the bill of exceptions sufficiently assailed the material findings in this regard. In determining the question as to whether the assailed findings were sufficiently supported by the evidence, the trial court undoubtedly had the right to consider all the evidence given upon the trial, including that given on behalf of plaintiffs in support of their claim. That evidence as to the nature of the transaction between the parties was as available to defendant in support of her cross-action involving the same transaction, as it was to plaintiffs in support of their action, and she had a perfect right to rest her claim thereon if she so desired.

Nor do we understand that, as urged by plaintiffs, the trial court, in the determination of the question as to whether the assailed findings were sufficiently supported by the evidence, was required to accept as true certain other findings of probative facts not assailed by specification of insufficiency, which probative facts were not such as to make of the findings assailed mere conclusions of law rather than findings of the ultimate facts. The question as to the sufficiency of the evidence to support the assailed findings is to be determined solely from the admissions of the pleadings and the evidence given upon the trial.

Coming to a consideration of these matters, we find sufficient ground for sustaining the action of the lower court in granting a new trial. The evidence was such as to warrant the trial court in concluding that the facts were in no material respect different from those in *Parker v. Otis*, 130 Cal. 322, 330, [92 Am. St. Rep. 56, 62 Pac. 571, 927], where the transaction was pronounced to be similar to that involved in *Sheehy v. Shinn*, 103 Cal. 325, [37 Pac. 393]; *Kullman v. Simmens*, 104 Cal. 595, [38 Pac. 362], and kindred cases, and therefore prohibited by the constitutional provision. The facts, as briefly stated by this court in that case, were as follows: "Plaintiff paid to defendants certain money, accompanied by an order to purchase certain stocks; defendants went into the stock board, bought and paid for these stocks in full at the market rate; defendants then credited plaintiff with the money paid by him (which was always less than the amount paid for the stocks by defendants, or, in other words, was but a margin of the cost), and by agreement held the stock as security for their commissions, advances, and for the accumu-

lating interest thereon, with the power to sell the stocks to protect themselves against a decline in value; defendants did not keep the particular stocks purchased, but had others of like character, and could and would have delivered a like number of shares to plaintiff upon full payment of all balances due at the time upon demand; defendants acted only as agents of plaintiff and had no interest in the stocks beyond their commissions, advances, and the agreed interest." In the case at bar, Wickersham did not pay any portion of the purchase price, but his deposit of the three hundred and fifty shares of stock as collateral security had the same effect, and afforded the necessary margin. (See *Cashman v. Root*, 89 Cal. 373, 378, 379, [23 Am. St. Rep. 482, 26 Pac. 883, 12 L. R. A. 511].) It is said that plaintiffs here did not have power to sell the stocks at any time to protect themselves against a decline in value, and that therefore one of the essential elements of a sale on margin was absent. We are of the opinion that the evidence was such as to fully warrant the inference that such power to sell was present. Plaintiffs' contention to the contrary is based entirely upon the theory that Wickersham had become the owner of the one thousand shares, and as such owner had delivered the same in pledge, but the evidence was not such as to compel the court to accept such theory. According to the evidence of one of plaintiffs' witnesses, Wickersham had stated to him that after the stock had depreciated he had gone to plaintiffs and told them not to sell him out, and that they had promised that they would not, thus indicating his understanding of their agreement to be that they had the power to sell. There was nothing in the testimony of plaintiffs' witnesses as to statements made by Wickersham to them as to his transaction with plaintiffs, to compel a conclusion contrary to that reached by the court below on the motion for a new trial. The creditors' claim based on this transaction first presented by plaintiffs to defendant's executrix for allowance, verified by the oath of one of the plaintiffs, stated the facts in such a way as to clearly and necessarily bring the transaction within the constitutional prohibition, and this, as we shall presently show, was competent evidence of admission against interest.

Plaintiffs rely on *Maurer v. King*, 127 Cal. 114, [59 Pac. 270], as establishing that in this case there was no contract

for the delivery of stock at a future day, but we cannot see that the case is in point. In part payment of the purchase price for certain real property, one Smith had delivered to Maurer one thousand shares of the stock of a mining company at fifty cents per share, making five hundred dollars thus paid, and to save Maurer from loss on the stock, guaranteed in writing that it would be worth that sum inside of two years from date, and if Maurer held it for two years and so requested, he, Smith, would take it from him and pay him for it at that rate. This guaranty was upheld. It was said that there was here no contract prohibited by the letter of the constitutional inhibition, nor any attempted evasion thereof, but a simple guaranty that property delivered in payment at a fixed price would be worth that price within two years, and if not worth it that the party delivering it would take it back and pay the amount in cash. It is manifest that the case in no degree assists plaintiffs.

It is not necessary for us on this appeal to go further than to hold that the evidence was such that it would have sufficiently supported findings in favor of defendant upon the question as to the nature of the transaction between plaintiffs and Wickersham. As to this, we have no doubt.

It is earnestly claimed that the creditors' claim first presented by plaintiffs to defendant for allowance was not admissible as evidence of admission against interest on the part of plaintiffs. After the rejection of this claim by defendant, a second claim in different terms was presented, and it was this claim that was in fact relied upon by plaintiffs on the trial of the action. The verified statement as to the nature of the transaction contained in the first claim was undoubtedly opposed to the claim made by plaintiffs on the trial. Ordinarily, where one has made statements opposed to the claim he asserts in an action, these statements are admissible against him as admissions against interest. Their force as admissions may be impaired and perhaps entirely destroyed by explanation of the circumstances under which they were made, but they are admissible, and are to be considered in connection with such explanations as may be made concerning them. We know of no principle under which the claim could be held inadmissible here. Plaintiffs seek to bring the case within the rule established in this state to the effect that where a

party to an action amends a pleading, statements in the superseded pleading cannot be used as admissions against interest on the part of the person making them. (See *Mecham v. McKay*, 37 Cal. 154, 165; *Ponce v. McElvy*, 51 Cal. 222; *Wheeler v. West*, 71 Cal. 126, 128, [11 Pac. 871]; *Ralphs v. Hensler*, 114 Cal. 196, 198, [45 Pac. 1062]; *Miles v. Woodward*, 115 Cal. 308, 316, [46 Pac. 1076].) This rule, the soundness of which has been disputed elsewhere (see 2 Wigmore on Evidence, sec. 1067), has never been held applicable except as to statements in a pleading in an action, which have been omitted by amendments made thereto, and we can see no good reason for extending it. Clearly, a creditor's claim against an estate is in no sense of the word a pleading, nor is there any such thing known to our law as the amendment of such a claim. The fact that such a claim must be presented prior to the institution of an action against an estate is entirely immaterial. The case is simply that of one who has presented a bill or demand embodying certain statements as to the facts upon which it is founded, and who subsequently seeks to maintain an action utterly inconsistent with the facts he has heretofore asserted. We can conceive of no good reason why the general rule as to the admissibility of evidence of admissions against interest was not applicable in the case of the claim under discussion.

From what has been said, it follows that the order granting the new trial must be affirmed.

As to the appeal from the judgment.

We are unable to agree with the learned judge of the trial court in his conclusion that there was such a variance between the facts as set forth in the second claim presented against the estate and in the complaint, and the facts proven by plaintiffs and found by the court, as to preclude a recovery.

There was no substantial variance between the facts set forth in the claim and those alleged in the first count of plaintiffs' complaint.

It was alleged therein that Wickersham agreed to repay to plaintiffs the advances made by them in the purchase of said stock, and the usual commissions for the purchase, within ninety days from the date of the agreement, with interest on the amount thereof, from the date of the advance until paid, at the rate of six per cent per annum, and the court found

that there was no agreement as to the time of payment, and no agreement as to the payment of any interest. These variances between the complaint and the findings are not claimed to be material.

The claim and complaint allege the transaction between the parties to have been fully had on March 5, 1901, and substantially allege the transaction to have been that plaintiffs were employed by Wickersham as his agents to purchase the stock for him, they to advance for him the purchase price, which he agreed to repay within ninety days with commissions and interest, and that he deposited with plaintiffs as security for the payment his three hundred and fifty shares of stock, and that it was agreed that plaintiffs should also hold the one thousand shares of stock purchased by them as security. The complaint further alleged the delivery of the one thousand three hundred and fifty shares in pledge. The trial court found that the one thousand shares were ordered by Wickersham on March 5, 1901, and on that day purchased *and delivered by plaintiffs to Wickersham*, they advancing the purchase price, and that Wickersham then agreed to repay said amount and broker's commissions, and that on the next day, he, voluntarily and without any request on the part of plaintiffs, deposited as security his three hundred and fifty shares, and then agreed with plaintiffs that they should also hold the one thousand shares purchased as additional security, and thereupon delivered to plaintiffs the whole one thousand three hundred and fifty shares in pledge. The court further found that Wickersham purchased the stock in good faith as an investment, and that it was contemplated between the parties that Wickersham would soon pay his indebtedness and take up the stock. It is claimed by defendant that if the findings of the court show a state of facts upon which plaintiffs could recover at all, it was due solely to the facts stated therein which were not alleged in the claim—that the allegations of the claim taken alone, not stating the elements of fact which took it from the operation of the constitutional prohibition already discussed, showed a case within that prohibition, and therefore that the claim was void on its face. We are unable to assent to the proposition that the claim presented established by its allegations its own invalidity, and this, undoubtedly, was the view of the trial court in overruling a

general demurrer to the complaint, stating substantially the same facts as those stated in the claim. The claim read fair enough upon its face, not stating facts which necessarily put it under the ban of the constitution. Whether the transaction was, in fact, in contravention of the constitutional provision, was a question of fact that could only be determined by a consideration of the circumstances under which it was had, and the conduct of the parties in reference thereto (see *Kullman v. Simmens*, 104 Cal. 595, 599, [38 Pac. 362]), and plaintiffs were not required to show those circumstances in their claim. It is not required that a claim against an estate should state the facts with all the preciseness and detail required in a complaint, and the sufficiency of such a claim is not to be tested by the rules applicable to pleadings. It should of course, as said in *McGrath v. Carroll*, 110 Cal. 79, 83, [42 Pac. 466], "sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it," and this, we think, the claim in question did. Undoubtedly, the cause of action established by the findings is precisely the cause of action attempted to be set out in the claim and in the complaint. By all, the claim asserted was one for money advanced by plaintiffs to the use of Wickersham, which he had agreed to repay. The case came fully up to the requirements of the rule declared in *Lichtenberg v. McGlynn*, 105 Cal. 47, [38 Pac. 541]; *McGrath v. Carroll*, 110 Cal. 79, [42 Pac. 466], and kindred cases, to the effect that a plaintiff can recover only upon the claim which has been presented and rejected, and cannot recover upon any other cause of action. (See, also, *Thompson v. Orena*, 134 Cal. 26, [66 Pac. 24].)

Even if the variance between the allegations of the complaint and the proof were such as to have actually misled the defendant to her prejudice in maintaining her defense upon the merits, they could not be held to be such as to constitute the case one of failure of proof under section 471 of the Code of Civil Procedure, and full and adequate remedy could have been afforded both parties by an order of amendment of the complaint upon such terms as might be just. (Code Civ. Proc., sec. 469.)

It cannot be held that the facts actually found by the court showed a transaction within the constitutional inhibition.

We have discussed the points made by defendant in support of the judgment, and are of the opinion that the same are not sustainable. In reversing the judgment we are satisfied that a new trial of the issues made by the complaint and the answer should be ordered. That the power to so order a new trial under the circumstances here existing is vested in this court there can be no doubt. (See Code Civ. Proc., sec. 53; *Schroeder v. Schweizer*, 60 Cal. 467, 471; *Merrill v. First Nat. Bank*, 94 Cal. 59, [29 Pac. 242].) This is eminently a proper case for the exercise of that power. It would be a most peculiar and unjust conclusion of this action, should it be finally adjudged herein that plaintiffs should recover a balance due them upon the contract between them and Wickersham, on the theory that the contract was valid, and that the defendant should recover property of Wickersham held by plaintiffs as security for the performance of the same contract, upon the theory that the contract was void, and yet such might be the result were we to order judgment for plaintiffs on the findings. The real question is as to the nature of the transaction had between plaintiffs and Wickersham, and the final determination of that question must settle all the claims involved in this action. The case here is precisely like that of *Schroeder v. Schweizer*, 60 Cal. 467, 471, in that the respondent obtaining judgment on the findings as they stood was not called upon to except to them in the lower court or to bring up the evidence by bill of exceptions to show that they were not sustained thereby. Unless this court can satisfy itself from the record as to the ultimate rights of the parties, it will not undertake in reversing a judgment to finally settle the same.

The portion of the judgment appealed from is reversed, and the cause is remanded for a new trial, with leave to the parties to amend their respective pleadings as they may be advised. The order granting defendant's motion for a new trial of the issues arising upon defendant's second amended cross-complaint and the answer of plaintiffs thereto is affirmed.

Shaw, J., and Sloss, J., concurred.

Hearing in Bank denied.

[S. F. No. 3613. Department One.—January 10, 1907.]

**FIREMAN'S FUND INSURANCE COMPANY, and
TRANSATLANTIC FIRE INSURANCE COMPANY,
Appellants, v. PALATINE INSURANCE COMPANY
et al., Respondents.**

FIRE INSURANCE—LOSS BY SEVERAL COMPANIES—CONTRIBUTION—CONTRACT FOR ADJUSTMENT PRO RATA—MISTAKE—UNJUST PAYMENT—RELIEF IN EQUITY.—Although in the absence of contract between several fire insurance companies whose policies require a *pro rata* payment of loss, the contracts are independent, and there is no contribution between them in case of payment of any excess by one or more, yet where several companies entered into an agreement to determine the amount of their loss, and to apportion it among themselves as their policies may require, and solely by reason of such agreement, in course of common adjustment, plaintiff companies were compelled, by mutual mistake of all the insurers, through their adjuster to pay all of the loss on specified machines insured by them, for which defendant companies, by the general terms of their policies, were liable *pro rata*, plaintiffs, upon discovery of the mistake, after such payment, were entitled, as parties to the contract, to be relieved in equity from the unjust and inequitable burden imposed upon them through such mistake.

ID.—CONSTRUCTION OF POLICIES—PROPERTY COVERED.—The several independent contracts of the plaintiff and defendant companies must be separately construed. The mere fact that the policies of plaintiffs were specially limited to "five type-setting machines with fixtures and appurtenances" contained in the building of the insured publishing company, and that they were not specifically mentioned in the policies of defendants, which covered "printing presses, stereotyping machinery, and other fixed and movable machinery, implements, tools, furniture, and fixtures," contained in the same building, does not authorize the exclusion from defendants' policies of the type-setting machines, coming clearly within their general provisions concurrently with plaintiffs' policies, though covering other property not insured by plaintiffs.

ID.—EFFECT OF PRO RATA CLAUSE, AND PAYMENT BY PLAINTIFFS.—Under the *pro rata* clause contained in all the policies, each of the insurers, plaintiffs and defendants, was originally liable to the insured for such proportion of the loss on the type-setting machines as the amount of the insurance thereon bore to the whole of the insurance covering the same. Plaintiffs, therefore, in paying to the insured the whole amount of the loss on such machines paid not only the amounts for which they were liable under their policies but also the amounts for which defendants were liable under their policies.

LD.—LIABILITY TO INSURED UNDER AGREEMENT—COMPULSORY PAYMENT.

—Under the terms of the agreement, the plaintiff companies when required to pay to the insured the whole amount of the insurance on the type-setting machines as the result of the agreed adjustment, would have no defense to an action against them by the insured based upon the adjustment and apportionment made which the insured had the right to accept and rely upon as a new agreement; and the plaintiff companies were therefore compelled to make such payment to the insured.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Goodfellow & Eells, for Appellants.

Van Ness & Redman, for Respondents.

ANGELLOTTI, J.—This is an appeal from a judgment for defendants entered upon the sustaining of a general demurrer to plaintiffs' complaint, and the refusal of plaintiffs to amend.

This action was one brought by two insurance companies against six other insurance companies, all of which companies, both plaintiffs and defendants, had insured by their several policies certain property of the Standard Publishing Company, also a defendant, against loss by fire. The policies issued by plaintiffs in terms covered "five type-setting machines, with fixtures and appurtenances thereunto belonging, contained in the said building of the said insured," and the policies issued by defendant companies in terms covered "printing presses, stereotyping machinery, and other fixed and movable machinery, implements, tools, furniture and fixtures contained in the building of the said insured." The policies of plaintiffs were each for two thousand five hundred dollars, and the policies of the defendant companies were each for smaller amounts. Each policy contained a provision to the effect that the insuring company should not be liable under its policy for a greater proportion of any loss than the amount thereby insured should bear to the whole insurance covering said property. The property having been "damaged or de-

stroyed" by fire, plaintiff and defendant companies "jointly authorized an adjuster of losses to act as their agent in adjusting and settling the loss with the defendant Standard Publishing Company." This adjuster, on behalf of the insurers, agreed with the insured that the total loss was \$4,373.68, and that the loss on the type-setting machines was \$2,859, and the loss on the other property \$1,514.68. Upon the supposition and theory, induced "by inadvertence and mistake," that the policies of defendant companies did not by their terms cover the type-setting machines, said adjuster agreed with the insured, *on behalf of all the companies*, that plaintiffs would pay the whole loss thereon, viz. \$2,859, and the defendant companies would pay, each in proportion to the amount of its policy, the loss on the other property, viz. \$1,514.68. Upon the same supposition and theory, proofs of loss against all the companies were thereupon prepared by the adjuster, and executed and presented by the insured in accord with the terms of said agreement. The defendant companies forthwith paid the amounts stated in said proofs of loss and claimed from them, and received from the insured releases in full of all liability in respect of said loss. The type-setting machines were machinery contained in the building of insured, and it is claimed that they were covered by the description of property insured contained in the policies of the defendant companies, and that such companies were liable to the insured for a proportionate part of the loss thereon. Neither plaintiffs nor insured knew of the mistake of the adjuster at the time of the payment by and release of defendants, nor until a long time thereafter. Upon discovery of the facts, plaintiffs demanded of defendants that the adjustment be reformed, and that they contribute to the payment of the loss upon the type-setting machines, which they refused to do. It is alleged that thereafter "the plaintiffs were compelled to and did pay the said insured," the whole of the loss on said type-setting machines, \$2,859, each paying half, and the defendants have not contributed or paid plaintiffs any portion thereof.

This is the case made by the complaint. Upon these facts, plaintiffs asked that the adjustment be set aside and reformed, that an accounting be had between plaintiffs and defendants in respect to the amount of said loss and the moneys paid and

which should be paid by the several plaintiffs and defendants respectively, and that defendant companies be required to pay plaintiffs such proportion of the loss on the type-setting machines as was due the insured from them under the terms of their respective policies.

We think there can be no doubt, under the allegations of the complaint, that the policies of the defendant companies, by their terms, covered the type-setting machines. There can be no question as to the fact that if plaintiffs' policies had not been issued at all, the broad terms of defendants' policies would necessarily have included not only the property specifically mentioned, but also all other fixed and movable machinery contained in the building of insured, for it is so expressly declared thereby. The language could not have been more inclusive. The mere fact that plaintiffs' policies were limited in terms to a portion of the property not specifically mentioned in defendants' policies, and only included in the general designation of machinery, does not authorize us to exclude from defendants' policies property coming clearly within their provisions. There was no connection between the contracts of plaintiffs and defendants. Each of the companies had a separate, independent contract with the insured, which must be separately construed. Defendants' contracts were clear and free from ambiguity so far as the descriptions of property insured were concerned, and must be read according to their terms, regardless of the manner of description used in other contracts to which defendants were not parties.

Defendants' policies, therefore, covered not only the property other than type-setting machines, but also, concurrently with those of plaintiffs, covered such machines. Under the *pro rata* clause contained in all the policies, each of the insurers, plaintiffs and defendants, was originally liable to the insured for such proportion of the loss on such machines as the amount of the insurance thereon bore to the whole of the insurance covering the same. Plaintiffs have, therefore, in paying to insured the whole amount of the loss on the type-setting machines, paid not only the amounts for which they were liable under their policies, but also the amounts for which defendants were liable under their policies.

If this were all, whatever might be said as to moral reasons in favor of the reimbursement of plaintiffs by defendants,

plaintiffs would have no legal cause of action against defendants. It is well settled that there is no right of contribution among insurers whose policies contain such a clause. Each of the contracts of insurance is entirely separate and independent of all the others. Each insurer is liable directly to the insured for its proportion of the loss, and the insured can recover from any insurer only such proportion of the loss as it is liable for under the terms of its policy. The payment by one of such insurers of a larger amount than it is bound to pay in no way affects the liability of the other insurers for their proportion of the loss, and gives the party so paying no right to recover the excess so paid from the other insurers. (See 4 Cooley's Briefs on Law of Insurance, secs. 3099, 3108, 3862; *Hanover Fire Ins. Co. v. Brown*, 77 Md. 64, [39 Am. St. Rep. 386, 25 Atl. 989, 27 Atl. 314]; *Good v. Buckeye etc. Co.*, 43 Ohio St. 394, [2 N. E. 420].)

We are of the opinion, however, that the contract made by the insurers for the payment of the loss materially changed the situation. The insurers came together for the purpose both of determining the amount of loss and *apportioning the same among themselves as their policies might require*. It was immaterial whether they did this each by its own agent, or by a common agent jointly authorized to act for all. Having determined the total amount of loss satisfactorily to the insured and to themselves, they *jointly* agreed with the insured as to the respective amounts each insurer should pay. It was entirely immaterial to the insured in what proportion the various insurers paid, as long as the aggregate amount paid equaled the total loss. The insured was at liberty to accept whatever apportionment of liability the insurers jointly proposed, regardless of its own views as to whether thereunder each company was paying its proper proportion. If the insured was satisfied with the apportionment made, that was a matter which only concerned the insurers among themselves, and it is immaterial whether or not the insured believed each company was paying its proper proportion. Any mistaken theory of the insured in that behalf would not affect the validity of the settlement as to it, so long as it was satisfied therewith. It had the right to accept the joint proposition of the insurers as to the amount each should pay, and when it accepted it, the adjustment and apportionment

of liability constituted as to it a new agreement, upon which it was entitled to rely, and upon which a separate action might have been maintained against each insurer for the amount it had promised to pay thereunder. (See *Stockton etc. Works v. Glen's Falls Ins. Co.*, 98 Cal. 557, 569, [33 Pac. 633].) In view of the allegations of the complaint, we can conceive of no defense that could have been successfully made by plaintiffs here to an action by the insured against them, based on such agreement jointly made by all the insurers, and relying upon which the insured had made his demands against the various insurers, and had released the defendants upon payment by them of the amounts agreed upon as to them. Solely by reason of that agreement (which as to apportionment was one among the insurers, as well as one with the insured), plaintiffs were compelled to pay to insured amounts for which they were not liable under their policies, and for which defendants were liable. This burden was imposed upon them by the agreement to which all the insurers were parties, and, according to the allegations of the complaint, was entirely the result of inadvertence and mistake on the part of all the insurers. It was the intention of all the insurers to apportion the liability among themselves in accord with the terms of the respective policies, and it was inadvertently and mistakenly supposed and assumed by all the insurers, in the person of their common agent, that defendants' policies did not cover the type-setting machines, and for that reason alone the whole loss thereon was apportioned to plaintiffs. Solely in consequence of this mutual mistake on the part of the insurers, plaintiffs were compelled to pay the insured moneys for which they were not liable under their policies and for which defendants were liable. We know of no good reason why relief may not be obtained against the defendants from the results of such a mistake, entirely independent of any doctrine of assignment, contribution, or equitable subrogation, and none, in our opinion, is given in the brief of learned counsel for defendants. As said by their counsel, plaintiffs, according to their complaint, have a standing in equity as original parties to a contract entered into under mutual mistake of all the parties, to be relieved from the unjust and inequitable burden to which they have been subjected through such mistake, and to be restored, so

far as they can be without injury to innocent persons, to the position they would have occupied had it not been for such mistake.

We are of the opinion that the complaint sufficiently states a cause of action as against a general demurrer.

The judgment is reversed.

Shaw, J., and Sloss, J., concurred.

Hearing in Bank denied.

[S. F. No. 3942. Department One.—January 10, 1907.]

FRANCES V. KING, Appellant, v. CHARLES E. DUGAN
and LYDIA DUGAN, Respondents.

ORDER DENYING NEW TRIAL—DELAY IN SERVICE OF STATEMENT—SHOWING OF RELIEF—REVIEW UPON APPEAL—RECORD.—Upon appeal from an order denying a new trial, where admittedly the proposed statement on the motion was not served in time, if the record does not disclose any action of the court, upon a proper showing, under section 473 of the Code of Civil Procedure, relieving the moving party from the effect of such failure, the settled statement cannot be considered. A notice of motion for such relief, and a minute order granting it printed in the transcript but not embodied in the statement or bill of exceptions, is no part of the record.

ID.—PRACTICE—SETTLED STATEMENT—SUFFICIENCY OF SHOWING AS TO RELIEF FROM DEFAULT.—Though it is the better practice to incorporate in the settled statement a showing in terms that application for relief from default was made, and that the court granted the same; yet this substantially appears, where the settled statement shows that the only response to the objections that the statement was not prepared or served in time, consisted of affidavits of mistake, surprise, and excusable neglect, sufficient to justify the discretion of the court in granting relief from the default, and that the objections were heard in open court and submitted upon the affidavits, counter-affidavits, and a rebutting affidavit, and were overruled, and the statement was ordered settled and filed; and such settled statement will be considered upon appeal.

EJECTMENT—NAKED LEGAL TITLE—MISTAKE IN DESCRIPTION OF LOTS SOLD—POSSESSION UNDER EQUITABLE TITLE—DEFENSE—REFORMATION NOT REQUIRED.—Where the plaintiff in ejectment, having notice of the equities of the defendants, acquired the naked legal title of a vendor in one of two lots, both of which were

actually sold and possession thereof delivered by the vendor to the vendee, under a deed describing the acreage of both lots, but by mistake describing the metes and bounds of one lot only, the defendants, as subsequent grantees of such vendee, who are in actual possession of a part of each of said lots, having full equitable title to the part of one of them not fully described in the deed, may defend the action upon such equitable title without the necessity of a reformation of the deed.

ID.—RECORDED MAP—DEDICATION OF STREETS BY VENDEE—ESTOPPEL IN PAIS—NOTICE—STREETS NOT RECOVERABLE.—Where defendants acquired title to their lots bounded by streets shown upon a map recorded by the original vendee, they have an equitable right to the use of such streets by way of estoppel *in pais* against the vendee and all claiming under him; and where plaintiff claimed under him by subsequent deed, and took with notice of their rights to the use of the streets under such map, plaintiff cannot recover any part of the legal title in such streets.

ID.—EFFECT OF DECREE QUIETING PLAINTIFF'S TITLE AGAINST ORIGINAL VENDOR—TRANSFER OF NAKED TITLE.—A decree obtained by plaintiff claiming under such subsequent deed, quieting his title to the lot in controversy against the original vendor of the two lots, only had the effect to transfer the naked legal title of such vendor to the plaintiff in ejectment, who, having taken with notice of all of the equitable rights of the defendants, such equitable rights are a complete defense to his action upon the bare title.

APPEAL from an order of the Superior Court of San Mateo County denying a new trial. Geo. C. Buck, Judge.

The facts are stated in the opinion of the court.

Edward J. Linforth, for Appellant.

George C. Ross, for Respondents.

ANGELLOTTI, J.—This is an action in ejectment. Judgment went for defendants and plaintiff appeals from an order denying her motion for a new trial.

Defendants make a preliminary objection to any consideration by this court of the statement on motion for a new trial, on the ground that no statement was prepared or served within the time prescribed by law, or as extended by stipulation of counsel or any valid order of court. Admittedly the proposed statement was not served in time. Objection to the settlement of the statement was duly made and overruled.

In the absence of action on the part of the trial court made upon a proper showing under section 473 of the Code of Civil Procedure, relieving plaintiff from the effect of her failure, the statement could not be considered here. (See *Cameron v. R. R. Co.*, 129 Cal. 279, 282, [61 Pac. 955]; *Wheeler v. Karnes*, 125 Cal. 51, [57 Pac. 893].) It is claimed that there was no such action on the part of the trial court. We think that the statement sufficiently shows such action. It is true that what purport to be, first, a notice of motion for such relief and the settlement of the statement, and, second, a minute order granting said motion, printed in the transcript, constitute no proper part of the record on appeal, not being included in any bill of exceptions or statement, and cannot be here considered. (See Code Civ. Proc., secs. 661, 952.) But it does appear from the statement that in response to the objections, the only showing made by plaintiff was one by affidavits of mistake, surprise, and excusable neglect under section 473 of the Code of Civil Procedure. This was met by counter-affidavits on the part of defendants and by an affidavit in rebuttal on the part of plaintiff. The objections were heard in open court, and submitted to the court on these affidavits, and it is stated that they were "after consideration, overruled, and said statement ordered settled and filed." It would doubtless have been better and safer practice to incorporate in the statement a showing in terms that application for relief was made to the court, and also that the court granted the same, but we are inclined to the opinion that this should be held to be the effect of what is said therein. A sufficient showing of excuse was made to preclude us from saying the court abused its discretion in relieving plaintiff from the effect of her default.

The land involved in the action is a small strip thirty-seven feet wide and about three hundred and twenty-five feet long. It is the most easterly portion of lot 5, subdivisions of the Mezes Ranch, Belmont, in San Mateo County, adjoining lot 6 of the same tract. One Harriet M. Lewis was originally the owner of both lots 5 and 6, containing 9 acres of land. On February 2, 1893, said Lewis agreed to sell to one W. O. Brown all of said property, subject to a mortgage that covered the same, which Brown subsequently satisfied, and on that day executed her deed to Brown, intending to convey to him

thereby and he intending to acquire thereby all of said nine acres. The description in this deed was by metes and bounds and acreage. The acreage was correctly stated, but by mistake and inadvertence the metes and bounds expressed only included lot 6. Said Lewis forthwith delivered possession of all of said nine acres to Brown. He caused a portion thereof to be surveyed and subdivided into blocks, lots, and streets, and on March 30, 1894, filed in the office of the county recorder of San Mateo County a map showing these subdivisions and streets. The strip of land in suit was the westerly end of block 2 according to said map, being the westerly thirty-seven feet of lots 11 to 19 thereof, both inclusive, prolonged across two streets shown on said map, Cypress Avenue and Hill Street. West of said strip and adjoining the same, another street, Laurel Avenue, was shown on said map, the lots named above fronting thereon. Immediately thereafter he caused the lots shown on the map to be staked out, and the streets to be opened, graded, and turnpiked, and ever since then they have been open, and used by the public as desired. He sold and conveyed lots by reference to said map. On April 5, 1894, he mortgaged a portion of the property to the Occidental Building and Loan Association, describing the property mortgaged by reference to said map, including lots 11 to 16, both inclusive, in block 2, as laid out on said map. On January 24, 1900, in foreclosure proceedings brought thereon, a decree of foreclosure sale was given, and at the sale thereunder defendant Charles E. Dugan purchased all of the mortgaged property, and subsequently received the commissioner's deed, and he thereafter transferred the property to the defendant Lydia Dugan, since when she has been in possession thereof. The defendants took the land relying on the correctness of said map both as to lots and streets, and believing that such streets had been dedicated as a means of access to the lots, and will suffer great loss shall the streets be now closed or obstructed. Until July 26, 1901, Brown continued in possession of all of said lot 5, except that portion embraced in the lots and streets shown on the map, and the lot was assessed every year to and including the year 1901 to him.

Plaintiff's deraignment of title consists of a subsequent deed from Brown to one William F. Sawyer of lot 5 of the

Mezes Ranch, a quitclaim deed for the same property dated November 7, 1901, from said Sawyer to her, and a decree quieting her title as to the same property as against Harriet M. Lewis, in an action to quiet title commenced by her on December 27, 1901.

Prior to the commencement of her action to quiet title, plaintiff had actual notice of the sale by Lewis to Brown of the whole of lots 5 and 6, and of the error in the Lewis-Brown deed, of Brown's going into possession of all of said property, and of the laying out, opening, grading, and turn-piking of the streets shown on the map.

The foregoing facts are shown by findings as to which there is more than ample support in the evidence. The trial court also found, in addition to the probative facts above stated, that plaintiff is the owner of those portions of the land in controversy that are included in Hill Street and Cypress Avenue, as shown on said map, and of the portion thereof included in lots 17, 18, and 19 of block 2, according to the Brown map, being the portion not covered by the Brown mortgage under which defendants deraign title, but that she is not the owner or entitled to the possession of the remaining portion of said strip—viz., the portion covered by the Brown mortgage. It further found that she was not entitled to the possession of the portion embraced in said streets, and that defendants had not ousted or ejected plaintiff from any part of the land. Upon these findings, judgment was given for defendants.

It is manifest that in so far as plaintiff claims under Brown, her only source of title other than the decree quieting her title as against Lewis, her rights are subordinate to those of defendant Lydia Dugan, who acquired by mesne conveyances under a prior deed from Brown. Said defendant acquired under this chain of deeds as against Brown the absolute ownership of that portion of the land in controversy, which is included in the lots purchased at the foreclosure sale, being portions of lots 11 to 16, both inclusive, of block 2.

Regardless of any question as to whether the portions of said strip included in Cypress Avenue and Hill Street became public highways, there can be no question that as to those acquiring under Brown according to and on the faith of the map filed by him, they became highways as against Brown and his successors. They acquired the same rights as to the

land shown on the plat as such streets as against Brown and his successors, as they would if such streets were in fact public streets. Their rights in this respect are established under the doctrine of estoppel *in pais*, which is held applicable to the vendor who has declared to the purchaser that the parcels are streets, in favor of those who act thereon in making the purchase. The matter has been discussed many times by this court, but it is unnecessary to do more here than to cite the case of *Prescott v. Edwards*, 117 Cal. 298, [59 Am. St. Rep. 186, 49 Pac. 178]. So far, therefore, as plaintiff acquired under Brown, while she acquired the fee in the streets, she held it under the same conditions as her predecessor had held it, and subject to the same burden. As to those who had purchased under him on the faith of his declaration of record that the land constituted portions of public streets, she was bound by such declaration equally with him (Code Civ. Proc., sec. 1849), and, therefore, was not entitled to the possession thereof as against such purchasers.

As to the claim of plaintiff based upon the decree quieting her title to all of the property as against Lewis: The trial court found, upon sufficient evidence, that plaintiff commenced this action with full notice of defendants' equities. The utmost possible effect of the decree was to make plaintiff the successor, with full notice of the equities of defendants, of such rights as Lewis had in the property on the day the action to quiet title was commenced, December 27, 1901. Conceding that the bare legal title to the land in controversy was then in Lewis, defendant Lydia Dugan, by reason of the probative facts found as to the mistake in the deed from Lewis to Brown, had, as successor and purchaser from Brown, a perfect equitable right as against Lewis to the land she had purchased under Brown, and to the unobstructed use as streets of the necessary streets depicted on the Brown map, including Hill Street and Cypress Avenue. It is well settled that such equitable rights constitute a full and complete defense as against the bare legal title in an action of ejectment. (See *Hoppough v. Struble*, 60 N. Y. 430; *Walker v. Brem*, 67 Cal. 600, [8 Pac. 320]; *Meeker v. Dalton*, 75 Cal. 154, 158, [16 Pac. 764].) In the last case cited, the defense was asserted by the successor of the grantee in whose deed the mistake was first made (the mistake being repeated in the deed from such

grantee to the defendant, Dalton), and sustained as against a subsequent grantee with notice of the original grantor. This court said: "It is apparent that when Ringer (the original grantee) purchased and went into possession of the lot in controversy, he became the equitable owner of it; and when he sold to the defendants, the latter succeeded to all his rights. It is also apparent that when the plaintiff received his deed to the lot, he took only such right as his grantor had, and that was the naked legal title. The defendant, then, having the equitable title, coupled with the possession, the question is, could he set up that title as a defense to an action of ejectment brought against him by the holder of the legal title?" It was held that he could. Quoting from *Hoppough v. Struble*, 60 N. Y. 430, and declaring that the same rule obtains in this state, the court said: "A reformation of the deed is not necessary, but the same facts which will entitle defendant thereto will establish his equitable right to possession, and constitute a defense as effectual as the legal title." We can conceive of no good reason why this defense is not as available against plaintiff, the successor of Mrs. Lewis, with full notice of defendants' equities, as it would have been against Mrs. Lewis herself.

It thus appears that the conclusion of the trial court to the effect that plaintiff was not entitled as against defendant Lydia Dugan, to the possession of any portion of the land in controversy other than the small portion thereof included in block 2, being portions of lots 17, 18, and 19 thereof, was the necessary result of the specific probative facts found, the finding as to the right to possession of those portions included in Cypress Avenue and Hill Street being construed, as it must be when taken in connection with the other findings, to mean no more than that plaintiffs are not entitled as against said defendant to any such possession as would interfere with the use thereof as streets. This finding as to the right to possession is, under the circumstances shown by the record, sufficient to require the judgment that plaintiff take nothing by her action. It is unnecessary to consider the question as to whether the finding that plaintiff is not the "owner" of the portion of block 2 of which the defendant Lydia Dugan is the equitable owner, is technically correct or not. She did have the bare legal title thereto, but nothing more, and this

bare legal title was ineffectual for any purpose as against the defendants' equities.

There is no other point made requiring notice.

The order denying plaintiff's motion for a new trial is affirmed.

Sloss, J., and Shaw, J., concurred.

[S. F. No. 3903. Department Two.—January 10, 1907.]

**BUILDERS' SUPPLY DEPOT et al., Respondents, v.
DENNIS O'CONNOR et al., Appellants.**

MECHANICS' LIENS—ACTION BY SUB-CONTRACTORS—PERSONAL JUDGMENT AGAINST OWNERS.—In an action by sub-contractors to enforce liens for material and labor furnished by them to the contractor for the construction of a building, they are entitled only to enforce their claims against the land; and a personal judgment against the owners is erroneous.

ID.—DELAY IN PERFORMANCE OF CONTRACT—DEDUCTION OF DAMAGES BY OWNERS AGAINST LIEN-HOLDERS.—Where the contract was valid and properly recorded, and the rights of all parties rest upon it, and it provided for the allowance of damages to the owners for delay if the building was not finished in five months, the damages proved by the owners to have resulted from such delay should be deducted from the contract price as against lien-holders.

ID.—CONSTRUCTION OF CODE—PROVISION AGAINST OFFSETS.—The provisions of section 1184 of the Code of Civil Procedure against the diminution of the contract price as to all liens except the contractor's by any indebtedness, offset, or counterclaims in favor of the owners against the contractor, has reference to offsets not arising under the terms of the contract, and as to which from an inspection of the contract, materialmen and laborers could have no notice.

ID.—ATTORNEYS' FEES—UNCONSTITUTIONAL PROVISION.—The provision for attorneys' fees in favor of the plaintiff in mechanics' lien suits, made in section 1195 of the Code of Civil Procedure, in favor of each lien claimant whose lien is established, without any allowance to the defendant, and without like allowance in other cases, is in violation of the fourteenth amendment to the federal constitution, and of the provisions of the state constitution requiring that general laws shall be uniform, prohibiting special laws, and declaring

the "inalienable rights of all men to acquire, possess, and protect property."

ID.—COSTS—EXPENSE OF FILING LIENS.—The expense of filing liens is properly included as part of the "costs and disbursements" upon foreclosure thereof; and the provision of the code for the allowance of such expense as part of the costs is not unconstitutional.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Mullany, Grant & Cushing, for Appellants.

Appellants were entitled to the offset of damages for delay, arising out of the contract itself. (*Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 200.)

The provision for attorneys' fees is unconstitutional. So far as it violates the fourteenth amendment it is a federal question, and the decision of the United States Supreme Court on that question is conclusive. (*Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255.)

Barna McKinne, Wal. J. Tuska, and Maurice L. Asher, for Respondents.

The offset was not permissible under section 1184 of the Code of Civil Procedure, construed with section 1201 of that code, forbidding the waiver or impairment of a lien by any term of the contract, without the written consent of the lienholders, and making any term of the contract impairing a lien without such written consent void. (Code Civ. Proc., sec. 1201.) Section 1195 of the Code of Civil Procedure, as to the allowance of attorneys' fees as incident to the judgment of foreclosure, has been held constitutional by the district court of appeal with the approval of the court which denied a rehearing in this court. (*Peckburn v. Fox*, 1 Cal. App. 307, 82 Pac. 91.) *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, was not a mechanic's lien case, but had relation to damages for the loss of cattle. It is not analogous. The liens of the mechanic, artisan, and materialman are famed in law because the parties have in part created the very prop-

erty on which the lien attaches. (*Tuttle v. Montford*, 7 Cal. 358; *McCrea v. Craig*, 23 Cal. 525; *Humboldt Lumber Co. v. Crisp*, 146 Cal. 688, 106 Am. St. Rep. 75, 81 Pac. 30.)

McFARLAND, J.—Three mechanics' lien cases were consolidated and tried together, and judgment was rendered against Dennis O'Connor and Mary O'Connor, the owners of the land involved, who appeal from the judgment.

The judgment must be reversed for the following reasons:

1. The actions were not brought by the original contractor; they were all brought for material and labor furnished by plaintiffs as sub-contractors. Nevertheless personal judgments were rendered against the appellants. This was error, as plaintiffs were entitled only to enforce their claims against the land.

2. There was a written contract between appellants as owners of the land and the contractors, Barth and Scarf, for the construction of a certain building thereon. This contract was regular in form and was recorded as provided by the code, and it is admitted that the rights of all parties rest on said contract, the contract providing that the building was to be built for seven thousand five hundred dollars and to be finished in five months—and if not finished within the five months the owners were to be allowed whatever damages the delay should cause. The building was not finished until about two and a half months after the stipulated time; and appellants averred and offered evidence to prove that they were damaged by the delay in the sum of \$359.50. Respondents objected to this evidence, and the court sustained the objection upon the ground that appellants could not avail themselves of the damage, even if proved, because of a clause in section 1184 of the Code of Civil Procedure that "As to all liens, except that of the contractor, the whole contract price shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim, in favor of the reputed owner and against the contractor." But it was definitely settled in *Hampton v. Christensen*, 148 Cal. 729, [84 Pac. 200], that damages for failure of the contractor to finish the work within the time specified in the written contract may be deducted by the owners as against lienholders, and that "the clause has reference, in the first place, to offsets not arising under the terms

of the contract, and as to which, from an inspection of the contract, materialmen and laborers could have no notice." The opinion in that case is quite full on the point, and we need not further discuss it here. The appellants were therefore entitled to deduct from the amount of the money remaining in their hands whatever damages they suffered for the delay in finishing the building, and the court erred in refusing to allow them to introduce evidence of such damage.

3. The court allowed an attorney's fee in each of the cases, and appellants contend that such allowance was erroneous because the statutory provision directing the allowance of such a fee is unconstitutional and void. In our opinion this contention must be sustained. In a few instances this court has affirmed judgments for plaintiffs in mechanics' lien cases which included attorney's fees; but our attention has not been called to any case where the question of the constitutionality of the statute providing for such fees has been raised, or presented to the court for adjudication. In the case at bar the question has been for the first time raised.

The statutory provision in question is found in section 1195 of the Code of Civil Procedure, and is as follows: "The court must also allow, as a part of the costs, . . . reasonable attorneys' fees . . . to be allowed to each lien claimant whose lien is established, whether he be plaintiff or defendant." It is to be noticed that this section provides for an attorney's fee to plaintiff but not to defendant, even though the latter be successful in the action; and that attorneys' fees are allowed even to plaintiff only in actions under the mechanics' lien law—the general rule being that "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." (Code Civ. Proc., sec. 1021.) This provision is in our opinion violative both of the federal and the state constitution—of the fourteenth amendment of the former, which guarantees to every person "the equal protection of the law," and of the provisions of the state constitution which provide that general laws shall be uniform, prohibit special laws, and declare the inalienable rights of all men of acquiring, possessing, and protecting property. A statute which gives an attorney's fee to one party in an action and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions

where, as in the statute here in question, the distinction is not founded on constitutional or natural differences, is clearly violative of the constitutional provisions above noticed.

That said law is violative of the fourteenth amendment to the federal constitution was established by the supreme court of the United States in *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, [17 Sup. Ct. 255]. In that case the statute of the state of Texas allowing attorney's fee to any person having a *bona fide* claim against a railroad company for services, or for damages, or for stock killed, was held to be unconstitutional because violative of the said fourteenth amendment. The court, speaking of the statute, said: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong. They do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

In the decisions of several states a statute similar to the one involved has been held unconstitutional. The question is elaborately discussed by the supreme court of Colorado in *Davidson v. Jennings*, 27 Colo. 187, [83 Am. St. Rep. 49, 60 Pac. 354], and a statute of that state similar to ours declared void. The opinion rendered in the case is an exhaustive one, and we will make only a few quotations from it. After stating the statutory provisions the court says: "It will be seen that this section imposes a penalty upon the defendant for

exercising, in this class of cases, the common right of making a defense, which is accorded to every other litigant in the courts, by subjecting him to the payment of the plaintiff's attorney's fees if he is successful, without giving him (the defendant) a reciprocal right if he is victorious." And the court further says: "We are unable to perceive any reason why, in actions to enforce their claims for merchandise or material furnished in the erection of a house or for the development of a mining claim, they should be afforded any other or greater rights than are given other merchants who furnish provisions or supplies to persons for family consumption, or that their debtors should not have the same right to contest the justice of their claims upon the same terms and conditions as are afforded to other debtors by the general law of the land. It is no answer to say that the debtor may avoid the imposition of this additional cost by paying his honest debts because the very purpose of the litigation he invokes is to determine whether he owes the debt or not. And it is immaterial whether he successfully defeats the larger part of the claim. He may, nevertheless, be mulcted in a sum which will deprive him of any benefit from the defense which he has legitimately established. It is also equally immaterial whether he interposes a vexatious defense or makes an honest though unsuccessful one, or allows judgment to be taken against him by default; he is subjected to the same penalty." Many cases are cited which sustain the opinion. This case was afterwards expressly approved by the courts of Colorado. (See *Perkins v. Boyd*, 16 Colo. App. 266, [65 Pac. 350], and cases there cited.)

In *Atkinson v. Woodmansee*, 68 Kan. 71, [74 Pac. 640, 64 L. R. A. 325], the supreme court of Kansas held unconstitutional a clause of a Kansas statute as follows: "In any action brought by any artisan or day laborer to enforce any lien under this act, where judgment be rendered for plaintiff, the plaintiff shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action." It will be observed that in this statute the special advantage is given only to the "artisan or day laborer," and not to materialmen, who constitute the main lien claimants in California; but the provision was, nevertheless, held void. The court says: "Under the constitution of the

state of Kansas, artisan and owner, contractor and laborer, are each one possessed of equal and inalienable rights to life, liberty, and the pursuit of happiness. . . . The burden of the law upon them should be as equal and impartial as the law of gravitation, and yet, in the baldest and most arbitrary manner imaginable, this act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others,"—and then follows a quotation from the case of *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, [17 Sup. Ct. 255], above noticed.

In *Hocking Val. Coal Co. v. Rosser*, 53 Ohio St. 12, [41 N. E. 263], the supreme court of Ohio held unconstitutional a statute providing that in an action for wages the plaintiff should recover an attorney's fee. The court said: "Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulcted in an attorney fee, if an honest but unsuccessful defense should be interposed? A statute that imposes this restriction upon one citizen, or class of citizens, only denies to him or them the equal protection of the law." And further the court say: "Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An adverse result in either case deprives the defeated party of property."

In *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, [43 N. W. 1006], the supreme court of Michigan held that a statute authorizing an attorney's fee to be taxed to the party in a judgment for personal services was unconstitutional—being an attempt to give special advantages to one class at the expense of another.

In *Wilder v. Chicago Ry. Co.*, 70 Mich. 382, [38 N. W. 289], the supreme court of Michigan held that an act authorizing an attorney's fee against a railroad company in an action for injury to stock was unconstitutional and void. In *Openshaw v. Halfin*, 24 Utah, 426, [91 Am. St. Rep. 796, 68 Pac. 138], the supreme court of Utah held that a statute allowing at-

torneys' fees to plaintiff in an action to compel the release of a mortgage was unconstitutional as special legislation, and violative of the constitutional principle of equal protection to all. (See, also, *Durkee v. Janesville*, 28 Wis. 464, [9 Am. Rep. 500].)

In the opinions rendered in the cases above noticed there are many citations of authorities sustaining the opinions; but we have been unable to verify these citations on account of the difficulty of access to books since the recent destruction here by fire of law libraries. We are satisfied with the reasoning on the point in the cases which we have cited and quoted from, and deem it unnecessary to discuss the matter further.

Upon the three grounds above stated the judgment must be reversed.

Appellants also make the contention that the court erred in allowing plaintiffs as costs the expense of filing their liens, upon the ground that the statute providing therefor is unconstitutional; but in our opinion this contention is not maintainable. The constitution imposes upon the legislature the duty of providing for these liens; and as the filing of the liens is part of the legislative method of perfecting them, we think that the small expense of such filing is properly included in the phrase "costs and disbursements."

The judgment is reversed, and the cause remanded for a new trial.

Henshaw, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[S. F. No. 4029. Department Two.—January 10, 1907.]

DAVID JACKS, Respondent, v. CHARLES J. DEERING,
Administrator, etc., Appellant.

FORECLOSURE OF MORTGAGE—MENTAL INCAPACITY OF MORTGAGOR—FINDINGS—RESCISSION NECESSARY.—In an action to foreclose a mortgage where the court expressly finds that when the note and mortgage were executed the mortgagor was of unsound mind but not entirely without understanding, nor had her incapacity been judicially determined, the findings show a case where rescission is necessary under the terms of section 39 of the Civil Code.

ID.—DECISION UPON FORMER APPEAL—INFERENCES FROM DIFFERENT FINDINGS—VOID CONTRACT—LAW OF CASE INAPPLICABLE.—A decision on a former appeal based upon inferences from different findings, that it was intended to find a case of general mental incapacity, entirely without understanding, making the mortgage a void contract within section 38 of the Civil Code, is not the law of the case upon the present appeal, based upon express findings to the contrary of such inferences.

ID.—HARMONY OF FINDINGS REQUIRING RESCISSION—CONJUNCTIVE FINDING.—A conjunctive finding that the mortgagor did not have sufficient mental capacity to understand "the nature, purpose, and effect of the transaction," is consistent with the finding that she was not entirely without understanding when the note and mortgage were executed. It is consistent with a partial or full understanding of its nature and purpose, and with an imperfect understanding of the nature, purpose, and effect. The case, therefore, clearly falls within section 39 of the Civil Code, requiring a rescission.

ID.—FINDING AGAINST RESCISSION—GOOD FAITH OF MORTGAGEE—AFFIRMANCE OF FORECLOSURE.—Where the court found that no rescission was ever effected or attempted, though the attorney for the mortgagor, who became her administrator, had full knowledge of the transaction; and where it clearly appears that the mortgagee parted with full value for the mortgage in good faith, and in ignorance of the mortgagor's condition, and that it was represented to him that she was fully capable of transacting business,—a judgment foreclosing the mortgage will be affirmed.

APPEAL from a judgment of the Superior Court of Santa Clara County. A. L. Rhodes, Judge.

The facts are stated in the opinion rendered upon the former appeal, 139 Cal. 507, and in the opinion of the court upon the present appeal.

Jackson Hatch, and James H. Deering, for Appellant.

Bishop, Wheeler & Hoefler, Bishop & Hoefler, and William Rix, for Respondent.

HENSHAW, J.—This is the second appeal. The first appeal will be found reported in *Jacks v. Estee*, 139 Cal. 507, [73 Pac. 247], Mr. Estee having died, and Mr. Deering having been substituted as administrator in his place.

Some of the facts are set forth in the opinion above cited. Others will be noticed as may be necessary. Section 38 of the Civil Code provides: "A person *entirely without under-*

standing has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or for the support of his family." Section 39 of the same code provides: "A conveyance or other contract of a person of unsound mind, *but not entirely without understanding*, made before his incapacity has been judicially determined, is subject to rescission as provided in the chapter on rescission of this code."

Upon the trial of the case the judge made the following finding touching the mortgagor's mental soundness: "That Maria T. Divine, on June 1, 1896, the time when she executed the promissory note and mortgage to the defendant, was over the age of eighty-five years; that she was then, and for several years prior thereto had been, physically very infirm; that at the time of the execution of the promissory note and mortgage her mental capacity had become greatly impaired, such impairment having commenced and continued several years prior to that time; that she was then a person of unsound mind, *but was not entirely without understanding*, nor had her incapacity been judicially determined; that at the time of her execution of the said promissory note and mortgage *she did not have sufficient mental capacity to understand the nature, purpose and effect of the transaction* in which she was engaged, or of the promissory note and mortgage; that from that time until her death the impairment of her physical and mental capacities continuously increased."

The court also found:

"That Maria T. Divine lived for about two years after the execution and delivery by her of the said note and mortgage; and that she did not at any time after the execution and delivery of said note and mortgage, exercise, or attempt to exercise, the right of rescinding said note or mortgage.

"That within a few days after the date of the note and mortgage, Morris M. Estee was informed of the fact that said note and mortgage had been executed and delivered by Maria T. Divine to plaintiff, and at such time he also knew the mental condition of Maria T. Divine; and at the time of his appointment as administrator, he well knew the fact of the execution and delivery by Maria T. Divine of the said note and mortgage to plaintiff, and all the facts concerning that transaction, and the mental condition of the said Maria

T. Divine at the time of such transaction, and that the plaintiff had satisfied and canceled the said note and mortgage of Lillie T. Sparks.

"That from the date of the appointment of Morris M. Estee as such administrator there was no offer or attempt on his part as such administrator to rescind the said note and mortgage."

Appellants invoke the law of the case and insist that, notwithstanding the findings here made, the case is identical with that presented upon the former appeal, where it was held that under the findings the note and mortgage did not constitute a contract, by reason of the mental incapacity of the mortgagor. In this, however, appellants are in error. It will be noted that the discussion in *Jacks v. Estee* recognizes the failure of the court to find whether or not Mrs. Divine was "entirely without understanding," and declares "the findings do not go so far as this" but find only her incapacity to understand or comprehend the particular transaction in question. In the absence of this finding it will be noted that the language of the learned commissioner is not couched in terms of a judicial decision, but is limited to "inferences" and "suppositions." It declares that the question is "whether it may be inferred from the findings taken together that it was the intention of the court to find a general incapacity in the intestate." An inference which might be drawn from a given finding cannot be allowed to stand against an express finding to the contrary of the inference. The opinion further declares that the finding of incapacity "seems necessarily to imply her incapacity to understand such transactions in general." Again, it is said, "There is indeed a finding that Mrs. Divine was not insane," and "this seems to be in conflict with the findings we have been considering," "but we must suppose," etc. Thus the discussion in *Jacks v. Estee* was addressed to a condition of the record not here existing, to a record which contained no findings upon a matter as to which the record appealed from here is full and complete. It is apparent that the learned trial judge, with sections 38 and 39 of the Civil Code and the discussion of the findings upon the first appeal all before him, made the findings above set forth, for the very purpose of relieving from the necessity of any speculation, supposition,

or implication as to the exact facts and the meaning thereof which he meant to declare. And the findings as now presented are not only essentially different from those upon the former appeal, but forbid in their direct completeness the need of supposition and implication. The finding that Mrs. Divine did not have sufficient mental capacity to understand *the nature, purpose, and effect* of the transaction, stands consistently with the added finding that she was not entirely without understanding on the particular matter of the contract. There is here not only no conflict in the findings, but no lack of harmony in the court's utterances. The declaration is in the conjunctive, that she did not understand the nature, purpose, and effect. Had she been entirely without understanding, the finding should have been, and, drawn by so learned a judge as he who tried this case, would have been, in the disjunctive, and would have declared that she understood neither the nature nor purpose nor effect. As announced by the court, the declaration is consistent with a partial understanding, with the statement that she might have known fully the nature and purpose and might not have fully understood the effect, or that she might have understood, though imperfectly, the nature, purpose, and effect. This being so, the findings bring the case within the purview of section 39, where a rescission was necessary. There is no question in this case but that the mortgagee parted with full value for his mortgage, surrendering and canceling as he did the promissory note secured by a mortgage of Mrs. Sparks, the daughter of Mrs. Divine, and paying additionally the sum of \$221.55. The good faith of the mortgagee and his ignorance of Mrs. Divine's condition are not only established, but it is shown that Mrs. Sparks represented her mother as being fully capable of transacting business. Moreover, Mr. Estee, an attorney at law and the legal adviser of Mrs. Divine, was at once made aware of the transaction. Mrs. Divine lived for some time afterwards, and upon her death Mr. Estee became administrator of her estate. Neither during her lifetime nor after her death was any attempt at a rescission ever made.

The judgment appealed from is therefore affirmed.

Lorigan, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 3809. Department Two.—January 10, 1907.]

**CITY STORE, Appellant, v. SAN JOSE-LOS GATOS
INTERURBAN RAILWAY COMPANY, Respondent.**

PUBLIC NUISANCE—UNAUTHORIZED CONSTRUCTION OF RAILROAD IN STREET—PRIVATE ACTION—SPECIAL INJURY—RULES OF PLEADING—STATEMENT OF FACTS.—A railroad constructed on a public street without authority constitutes a public nuisance; but a private person may maintain an action therefor if it is specially injurious to himself, but not otherwise; and he must allege facts showing a special injury, not only greater in degree but different in kind from that suffered by the general public. General allegations of special or irreparable injury are insufficient; and the pleader must state facts from which the court can determine whether such injury exists.

ID.—STREET RAILROAD—ACTION BY ABUTTING OWNER—INJUNCTION—INSUFFICIENT COMPLAINT.—A complaint in an action by an abutting owner to enjoin the construction, operation, and maintenance of a double-track street railroad in a public street without right, which merely alleges as a resulting injury that "the property of plaintiff and the property rights of plaintiff will be irreparably injured and damaged in this, that the value of said property will be greatly diminished, free access in and to said property will be irreparably injured, and the rental value of said property will be greatly and permanently decreased,"—without stating the width of the street, or the proximity of the tracks to plaintiff's property, or whether any embankment or depression will be created preventing access to plaintiff's property, or that the operation of the road itself will affect him,—is insufficient, and a general demurrer thereto was properly sustained.

ID.—GENERAL AND SPECIAL ALLEGATIONS OF IRREPARABLE INJURY—OPINION OR CONCLUSION OF PLEADER.—The allegations in the complaint of irreparable injury in general, and of the particular specifications relative to it, amount to nothing more than the expression of an opinion or conclusion of the pleader, and do not constitute a statement of facts from which the court could determine whether the plaintiff's apprehensions of special injury are well founded or not.

APPEAL from a judgment of the Superior Court of Santa Clara County. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

John H. Yoell, for Appellant.

Cobb & Rea, and O'Neal & Richardson, for Respondent.

LORIGAN, J.—This action was brought to permanently restrain the defendant from constructing, operating, and maintaining a street railroad over Market Street, a public street in the city of San Jose.

A general demurrer to the complaint having been sustained and plaintiff declining to amend, judgment was entered for defendant, and from this judgment plaintiff appeals.

The only point presented on the appeal is as to the correctness of the ruling of the lower court upon the demurrer.

The plaintiff alleged the corporate existence of plaintiff and the defendant railway company; that plaintiff is the owner in fee of real estate on the east line of South Market Street in the city of San Jose, adjacent and contiguous to and abutting upon the line of said street; that said city of San Jose is a municipal corporation, and South Market Street is a public street within the corporate limits thereof; that the defendant "without right so to do is about to commence the construction in and upon and over the said South Market Street, and, without right so to do, maintain and operate a double-track street railway" thereon, and that the line of said proposed railway is in front of, adjacent to, and contiguous to said real estate of plaintiff; that in the event of the construction, maintenance, and operation of said double-track street railway as proposed to be constructed "the property of plaintiff and the property rights of plaintiff will be irreparably injured and damaged in this that the value of said property will be greatly diminished, free access in and to the said property will be irreparably impaired and the rental value of said property greatly and permanently decreased:" that plaintiff has no adequate remedy at law.

These are the material allegations of the complaint, and it is quite manifest that the theory upon which the complaint was framed was that the construction of said street railroad on the public street, without right, as alleged, would constitute a public nuisance, the creation of which would be specially injurious to the plaintiff.

Undoubtedly a railroad constructed on a public street without authority would constitute a legal obstruction, and hence be a public nuisance (*Anestoy v. Electric R. T. Co.*, 95 Cal. 311, [30 Pac. 50]), which any private person might sue to abate, or the threatened construction of which he might en-

join, where his property is, or will be, specially damaged or injured through its existence.

This is the general rule of the authorities, and finds expression in our code. "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." (Civ. Code. sec. 3493.)

In order, therefore, to warrant the maintenance of an action by a private individual to abate or restrain the construction of a public nuisance, it is not enough to allege that injury has been or will be sustained by him thereby, but it is essential that it appear by proper allegations in the complaint, to be supported by proof upon the trial, that this injury is, or will be, special in character to him—that is, that such injury will not only be greater in degree, but will be different in *kind* from that sustained by the public generally. Among many of the cases to this effect are *Aram v. Schallenger*, 41 Cal. 449; *Lewiston Turnpike Co. v. Shasta Wagon Road Co.*, 41 Cal. 562; *Payne v. McKinley*, 54 Cal. 532; *McCloskey v. Kreling*, 76 Cal. 511, [18 Pac. 433]; *Gardner v. Stroeve*, 89 Cal. 26, [26 Pac. 618]; *Siskiyou Lumber etc. Co. v. Rostel*, 121 Cal. 513, [53 Pac. 1118]; *Reynolds v. Presidio and Ferries Railroad Co.*, 1 Cal. App. 7, [81 Pac. 1118].

It is alleged that the defendant is about to commence the construction of the railroad on a highway upon which plaintiff's property fronts which will constitute a nuisance—a public nuisance. Being a public nuisance, it was essential that within the above rule plaintiff must distinctly aver some special injury to its property which it would sustain by its construction before it could maintain an action for its abatement. The most common form of injury which the owner of land abutting upon a public highway specially sustains as to his property by reason of the obstruction of the highway in front thereof, arises from the fact that such obstruction will interfere with the easement incident to his property of free access from it to the public highway. Where the obstruction of the public highway has this effect it becomes as to the owner of property abutting thereon a private nuisance which he may have abated. (*Hargro v. Hodgdon*, 89 Cal. 623, [26 Pac. 1106]; *Helm v. McClure*, 107 Cal. 205, [40 Pac. 437].)

But in order to warrant the interposition of a court of equity to grant this relief facts must be alleged in the com-

plaint from which it shall appear that the obstruction of the highway will be specially injurious to plaintiff's property abutting thereon, and it is quite evident that the complaint at bar does not state these facts.

It is alleged that the defendants are about to commence the construction of a double-track street railroad on the street in front of the property of plaintiff without right to do so, and that by reason thereof the property rights of plaintiff will be irreparably injured in this, that the value of the property will be greatly diminished, free access to it irreparably impaired, and the rental value permanently decreased. These allegations of irreparable injury in general, and the particular specifications relative to it, amount to nothing more than the expression of an opinion or the conclusion of the pleader; they do not constitute a statement of facts from which the court could determine whether the apprehensions of plaintiff that its property would be specially injured by the construction of the street railroad were well founded or not. General allegations of irreparable injury are never sufficient—the facts must be stated from which it will appear that irreparable injury will probably follow.

Under the authorities no right of action could accrue to the plaintiff from the mere fact that there was an unlawful obstruction of the public highway. In order to warrant an action therefor at its instance it must appear that it is specially injured in its property by such obstruction. This right of action proceeds, not from the fact that the obstruction is a public nuisance, but because as a public nuisance it specially injures its property, and whether it does or not could only appear from a statement of facts relative to the nature of the obstruction, and from which the court could determine whether the plaintiff's claims of special injury arising therefrom were well founded or not. Now as to the construction of said railroad. It is only alleged that defendant proposes to unlawfully construct it and operate it on the public street. The simple construction of a railroad along a public street would not necessarily injure the property abutting thereon. It would not be the creation of such a public nuisance that necessarily special injury would follow from it. If such injury would be suffered it must proceed from the method of the construction, maintenance, or operation of

the road. In the complaint, however, there is no statement as to any of these matters. It does not appear what is the width of the street over which it is proposed to construct this road; the proximity of the tracks to plaintiff's property; whether any embankments or depressions will be created preventing access to its property; or that the operation of the road itself will affect plaintiff. The complaint is silent as to any fact relative to the construction or operation of said road, or as to any fact from which it can be determined that any injury, special or otherwise, will result to the plaintiff. The complaint was defective in not having stated any facts from which it would appear that special injury to plaintiff's property would result from the creation of the alleged public nuisance, and hence the demurrer to it was properly sustained.

Judgment affirmed.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 3956. Department Two.—January 18, 1907.]

C. W. CHILDS et al., Appellants, v. M. A. de LAVEAGA,
Executor, etc., Respondent.

CORPORATIONS — LIABILITY OF STOCKHOLDERS — UNTENABLE ACTION BY CREDITORS AGAINST DISTRIBUTED ESTATE OF STOCKHOLDER.—Creditors of an insolvent banking corporation, who became such subsequent to the settlement of the final accounts of the executors of a deceased stockholder, who presented no claim against the estate, cannot, after distribution of the estate, which closed it so far as any claims against it were concerned, maintain any action against the executors to enforce the personal liability of the deceased stockholder.

ID.—PENDENCY OF APPEALS FROM DECREE.—The pendency of appeals from the decree of distribution which only involved the rights of the distributees as between themselves, cannot affect the right of the creditors of the corporation to maintain such action after the entry of the decree appealed from.

ID.—AFFIRMANCE OF JUDGMENT UPON MOTION — TERMINATION OF APPEALS FROM DECREE — DISCHARGE OF SURVIVING EXECUTOR.—A motion by the respondent to affirm the judgment should be granted upon the record showing that the action was commenced after the

original decree of distribution, as well as for the reasons appearing from a showing that the appeals therefrom had been finally determined, and the estate finally distributed, and the sole surviving executor, respondent, as well as the estates of the deceased executors, had been finally discharged from all liability, so that no administration is pending, and no relief asked for by the appellants could be made applicable or be enforced.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order refusing to change the conclusions of law. M. H. Hyland, Judge.

Motion by Respondent to dismiss appeal or affirm judgment.

The facts are stated in the opinion of the court.

R. J. Welch, and Heney & Cobb, for Appellants.

Timothy J. Lyons, for Respondent.

McFARLAND, J.—Plaintiffs as assignees of certain depositors in and creditors of the Union Savings Bank of San Jose, a corporation (now insolvent), brought this present action against the executors of the will of José V. de Laveaga, deceased, to recover a money judgment for an amount alleged to be such proportion of the said bank's indebtedness to plaintiffs' assignors as one hundred shares of the capital stock of said bank, alleged to have been held by said De Laveaga, deceased, at the time of his death, bears to the whole capital stock of said bank. Judgment went in the court below for defendant, and from this judgment, and also from an order refusing to change the conclusions of law, etc., plaintiffs appeal. There has also been submitted by respondent a motion for an order of this court "dismissing the appeal of the appellants herein or affirming the judgment appealed from," which motion will hereinafter be considered.

The main facts of the case are these: The said Jose V. de Laveaga, deceased, died testate on August 14, 1894, leaving a considerable amount of property, which included one hundred shares of the capital stock of said Union Savings Bank. The executors named in the will immediately qualified and commenced the administration of the estate. On October 2, 1894, they caused notice to creditors to be published calling for

creditors against the estate to present their claims within ten months thereafter. The time for the presentation of claims expired August 2, 1895; and thereafter on August 26, 1895, the court in which the administration was pending made and entered judgment adjudging that due and legal notice to creditors of the said decedent had been given and made. Thereafter the executors presented their final account, and on February 3, 1896, the court made an order settling, allowing, and approving said account "as and for a final settlement in the matter of said estate and the administration thereof." No appeal was ever taken from this order. Afterwards, on the petition of Maria Josefa Cebrian and others claiming to be distributees of the estate, the court, on June 4, 1900, entered a final decree of distribution in said estate. By that decree the estate was distributed as follows: "The one quarter thereof to said Maria Josefa Cebrian, the one quarter thereof to said Maria Concepcion de Laveaga; the one quarter thereof to said Miguel A. de Laveaga; and the one quarter thereof to said Anselmo Jose Maria de Laveaga." In the decree it was adjudged that the account of the executors had been settled, and further: "That all the debts of said decedent and all claims against the estate of said decedent had been fully paid, satisfied and discharged before the filing of said petition for distribution of the said sisters of the said decedent, and all expenses and charges of administration up to the filing thereof had been fully paid, and all expenses and charges of administration up to the present time, and all taxes upon said estate have been fully paid, satisfied and discharged." No appeal from this decree has ever been taken by the appellants in the case at bar, or by any person asserting a claim against the estate. An appeal was taken by the three first-named distributees, Maria Josefa Cebrian, Maria Concepcion de Laveaga, and Miguel A. de Laveaga from that part of the decree which awarded one fourth of the estate to the said Anselmo Jose Maria de Laveaga; the said appellants claiming that the trial court erred in distributing any part of the estate to the said Anselmo, and that the whole estate should be distributed in three equal parts to the said three appellants. There was also an appeal by one Dolores A. de Rivera, who claimed that she was entitled to distribution in the estate, and that the court erred in not so deciding. The

original transcript in the case at bar shows that said two appeals were pending in the appellate court and had not been disposed of when the present action was tried.

At the time of the death of Jose V. de Laveaga the said bank was apparently not insolvent; indeed dividends were afterwards declared. And at the time of the death of said Jose plaintiffs and their assignors were not depositors in and creditors of said bank; they did not become such depositors and creditors for several years afterwards, to wit: "between December 29, 1897, and January 30, 1899." The bank became insolvent on January 30, 1899. The assignors of plaintiffs did not present any claim to the executors of the said estate within the time allowed therefor. They commenced the present action on January 2, 1901, which was after the said final decree of distribution above stated.

A number of questions are discussed by counsel, as, for instance, whether under any view plaintiffs herein could recover without having presented a claim within the ten months allowed for that purpose; whether at the time the plaintiffs' assignors became creditors of the bank the said estate was liable for a proportionate share of the indebtedness of the bank to plaintiffs, or whether the heirs and devisees of the said deceased Jose were then the owners of the stock and liable for such proportion. But these and other questions raised are not necessary to be determined, because, under our view, this action could not be brought and maintained after the said final decree of distribution. The estate was then closed so far as any claims against it are concerned. The appeals above noted merely attacked that part of the decree which determined who were the rightful distributees; and no matter how those appeals might be determined, the rights of the contesting distributees as to the proper distribution of the estate between them were the only matters involved. We think, therefore, that the judgment should be affirmed upon the original transcript.

As before stated, the respondent moved for an order dismissing the appeal or affirming the judgment upon grounds stated in the motion. It appears from the papers filed on said motion that afterwards on the appeal of said Dolores A. de Rivera the appeal was dismissed; that on the said appeal of said Maria Josefa Cebrian and others the appellate court

held that the court below erred in distributing one fourth of the estate to said Anselmo and reversed the judgment for that reason; and that after the remittitur went down the trial court made an amended decree of distribution by which the whole estate was distributed in three equal parts to the said three appellants. This decree was made and entered on the twenty-fifth day of March, 1904. It appeared further that the executors, Thomas Magee and Daniel Rogers, had both died, leaving M. A. de Laveaga as sole executor, and that on June 6, 1904, the court made an order releasing and discharging the said remaining executor, M. A. de Laveaga, and his sureties, and the estates of the deceased co-executors, Thomas Magee and Daniel Rogers, from all liability to be thereafter incurred, and decreeing that "the said estate is fully distributed, and the trust of administration, and of said executors, is settled and closed." No appeal has ever been taken from this decree of final distribution or the said order discharging the executor. It appears, therefore, that there is no executor of said decedent nor any administration of the estate pending, and that no relief asked for by appellants could be made applicable or be enforced. We think, therefore, that the motion that the judgment be affirmed should, also, for the reasons set up in the motion, be granted.

The judgment and order appealed from are affirmed.

Henshaw, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[S. F. No. 3850. Department Two.—January 18, 1907.]

E. MYRON WOLF, Appellant, v. BOARD OF SUPERVISORS OF SANTA CLARA COUNTY, Respondents.

PRELIMINARY INJUNCTION—POWER OF COURT TO MODIFY SUA SPONTE.—

It seems, on principle and authority, that the court which has granted a preliminary injunction *ex parte* which by its terms is to continue until further order of the court, may dissolve or modify it of its own motion whenever it becomes satisfied that the order was improvidently or erroneously made.

1D.—CONSTRUCTION OF CODE—QUESTION NOT DETERMINED—POWER TO MODIFY UNDER STIPULATION.—The question raised whether section 532 of the Code of Civil Procedure, providing for dissolution or modification of an *ex parte* injunction upon notice before trial, excludes the power of the court to act upon its motion, is not definitely determined, it being the clear effect of a stipulation upon the hearing of the case that "the entire matter should be submitted as a whole, pleadings, motions, orders, and the evidence." Thus the court has power to modify the injunction order after such submission before the final decision of the case.

APPEAL from an order of the Superior Court of Santa Clara County modifying a preliminary injunction. S. F. Lieb, Judge.

The facts are stated in the opinion of the court.

E. Myron Wolf, Appellant *in pro. per.*

J. H. Campbell, District Attorney, and C. W. Cobb, for Respondent.

McFARLAND, J.—This is an appeal by plaintiff from an order of the superior court modifying a preliminary injunction.

The material facts are these: It is averred in the complaint that the defendants, the board of supervisors, received bids for two proposed electric railroad franchises—the preliminary proceedings leading up thereto having been regular and in accordance with the statute on the subject; that plaintiff was the highest bidder, and one Dunlap, who was the only other bidder, the lowest bidder in each case; that the said board accepted each of Dunlap's bids, and refused to accept either of the plaintiff's bids; that they refused to pass any ordinance awarding said franchises to plaintiff, and threatened to pass an ordinance awarding the same to Dunlap. The prayer of the complaint is that the board "be enjoined and forbidden from passing any ordinance or ordinances granting said petitions for franchises privileges to the said George T. Dunlap, and that they be required to desist from refusing to pass ordinances to grant said franchises and bar privileges to the plaintiff herein, and for such other and further relief," etc. The supervisors filed a demurrer to the

complaint, and also an answer in which they denied that they intend to grant the said franchises to said Dunlap, or to any other person, but have determined that they will not award said franchises to any person because the bids are not at all commensurate with the value of the franchises, and intend to readvertise said franchises for sale, etc. To this answer the plaintiff filed a demurrer. Neither of said demurrers has been decided by the court. After the filing of the complaint the court made the following preliminary order: "It is hereby ordered that until further order of this court, said defendants, their agents, and servants, be restrained, and said defendants are hereby, and each of them is, and their agents and servants are, and each of them is, hereby forbidden and restrained from passing any ordinance or ordinances, granting the petition of George T. Dunlap for the franchises and privileges mentioned in the complaint of plaintiff on file herein, and from refusing to pass the ordinance necessary to grant said franchises and privileges to E. Myron Wolf, the plaintiff herein." The bill of exceptions contains the following: "That thereafter the said cause came on regularly for hearing upon the demurrer and trial of the cause," and, "It was then, there and in open court, stipulated and agreed by and between the said parties, that the entire matter should be submitted to the court as a whole, pleadings, motions, orders, and the evidence—and out of and from the same the court should deduce and declare what the rights, respectively, of the parties hereto might be," and that, "Defendants' demurrer was argued and evidence was then taken and the cause was duly submitted to the court for its decision." After this submission, but before having finally decided the case, the court made the following order: "It is ordered that the following words, clause and matter, to wit: 'and from refusing to pass the ordinances necessary to grant said franchises and privileges to E. Myron Wolf, the plaintiff herein' be and the same are hereby stricken from the writ of injunction heretofore issued herein, and said writ of injunction is modified to the extent of striking out said words, clause and matter therefrom, and said injunction is to that extent, alone, dissolved." This is the order appealed from.

The sole ground upon which appellant claims a reversal is the contention that the court has no jurisdiction to make

the said order on its own motion, because, as appellant contends, after a court has granted a preliminary injunction it can be dissolved or modified only under section 532 of the Code of Civil Procedure, which provides that, "If an injunction be granted without notice, the defendant at any time before the trial may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same." Whether this action is to be construed as merely giving to a defendant the right to, himself, move to dissolve or modify a preliminary injunction, and not touching the power of the court to dissolve or modify without any motion of defendant, or whether, as contended by appellant, it excludes all right of the court to so dissolve or modify except upon motion of defendant, is a question which, under our view, need not here be definitely determined. It may be said, however, that while our attention has not been called to any decision of this court on the subject, there are strong reasons for holding that an *ex parte* order not in its nature permanent, and, as expressed on its face, to continue only "until further order of this court," may be dissolved or modified by the court on its own motion whenever it becomes satisfied that the order was improvidently or erroneously made. And this has been held to be the law in other jurisdictions. We will notice one leading case. In *Conover v. Ruckman*, 33 N. J. Eq. 303, the vice-chancellor had "of his own motion" dissolved a preliminary injunction, and the plaintiff had appealed. It seems that section 120 of the statutes of New Jersey contained a provision very similar to section 532 of the Code of Civil Procedure, relied on by appellant. The appellate court in the New Jersey case said: "The appellant assigned, as one reason for reversal, that the order dissolving the injunction was irregular, in that it was made without the eight days' notice of a motion to dissolve, prescribed by the eighty-sixth section of the chancery act. (Rev. 120.) This reason cannot prevail. If the equity judge has allowed an interlocutory injunction which afterwards clearly appears to him to have been improperly allowed, he may, of his own motion, recall it at any time. Inasmuch as it was in his discretion, in the first instance, to refuse the injunction, he may, in his discretion, set aside the allowance of it if he is satisfied that it should not have been

allowed. The section referred to has reference to applications to dissolve made by a party."

But while we are inclined to agree with the court in the case above cited, we are of the opinion that the part of the bill of exceptions above quoted leaves no room, in the case at bar, for the said contention of appellant. It is there stipulated that "the entire matter should be submitted to the court as a whole—pleadings, motions, orders, and the evidence." This was a clear submission by the parties of all matters involved in the case, including among the "orders" the one granting the preliminary injunction.

The order appealed from is affirmed.

Henshaw, J., and Lorigan, J., concurred.

[S. F. No. 4646. In Bank.—December 7, 1906.]

THE TITLE AND DOCUMENT RESTORATION COMPANY, Petitioner, v. HON. FRANK H. KERRIGAN, Judge of the Superior Court in and for the City and County of San Francisco, Respondent.

ACT TO ESTABLISH LAND TITLES—LOSS OF RECORDS—PURPOSE OF STATUTE.—The act of June 16, 1906, providing "for the establishment and quieting of title to real property in case of the loss or destruction of records," was intended to provide a method whereby owners in possession of real estate in counties where the records are destroyed to such an extent as to make it impossible to trace a title of record may secure a decree which shall furnish a publicly authenticated title.

ID.—NECESSITY FOR TITLE OF RECORD.—It is practically essential, under our system of registration, to the security of ownership in real property that there should exist some method by which the title may be made clear of record, since a title which cannot be traced and established by some form of public record is practically unmerchable.

ID.—JUDICIAL NOTICE—RELIANCE UPON RECORDS.—In this country the system of registration has become so completely established that the courts can take judicial notice that in the great majority of cases parties dealing with real estate rely for proof of their titles upon the chain of title that will be disclosed by an examination

of the records, and in a small degree, if at all, upon the possession of the original instruments composing that chain.

Id.—COMMON KNOWLEDGE AS TO LOSS OF RECORDS IN SAN FRANCISCO—NECESSITY TO SECURE EVIDENCE OF TITLE.—It is matter of common knowledge that in the city and county of San Francisco there has been so great a destruction of the public records as to make it impossible to trace any title with completeness or certainty. Some provision was clearly necessary to enable holders and owners of real estate in this city to secure such evidence of title as would enable them to defend their possession and to enjoy the equally important right of disposition.

Id.—CONSTITUTIONALITY OF ACT—CONSIDERATIONS EMPHASIZING PRESUMPTION OF VALIDITY.—Considerations as to the real scope and purpose of the act, though not affording any ground for disregarding constitutional provisions, yet serve to emphasize the rule that in passing upon the constitutionality of a law every presumption and intendment in favor of the validity of the enactment are to be given effect.

Id.—DUE PROCESS OF LAW—PROCEEDING IN REM OR QUASI IN REM.—The act in question does not deprive any person of property without due process of law. The action does not differ in character from the action to determine heirship, which is a proceeding *in rem*. In any view the proceeding contemplated by the act is quasi *in rem*, merely to affect the interest of the defendant in specific real property within the state which has at the outset of the proceeding been brought within the control of the court. The constitutional requirement as to such action is satisfied by a substituted service of summons as to defendants not found within the state.

Id.—DUE PROCESS IN ACTION TO QUIET TITLE—JURISDICTION OF CHANCERY IN PERSONAM—POWER OF LEGISLATURE.—While in the exercise of its inherent equity jurisdiction in an action to quiet title a court of chancery acts only *in personam*, it is competent for the legislature, so far as the constitutional provision regarding due process of law is concerned, to confer upon courts of equity an extended power, so as to permit the court to bind the interest of persons in real property so far as that property alone is concerned, even though the defendant may not have been personally served with process within the state.

Id.—DUE PROCESS AS TO KNOWN CLAIMANTS.—So far as the rights of known claimants are concerned, who cannot be personally served with summons by reason of non-residence, the service by posting, publication, and mailing, and the naming of them in the memorandum appended to the summons, and in the affidavit required by the act to be served upon them, and notifying them when to appear, constitute due process of law; and the fact that they are not named in the complaint and body of the summons is immaterial.

Id.—DUE PROCESS AS TO UNKNOWN CLAIMANTS.—The notice to unknown claimants, by posting the summons describing the nature of the

action, the property involved, the name of the plaintiff, the relief sought upon the property, and its publication in a newspaper for two months, and the record of the notice of *lis pendens*, is as complete and full as from the nature of the case could reasonably be expected, and constitutes due process of law as to them.

ID.—METHOD OF PROCEDURE AS TO UNKNOWN CLAIMANTS—COMMON LAW

—POWER OF LEGISLATURE.—The fact that the procedure known to the common law cuts off the rights of unknown claimants only by failure to assert them within a limited period is not a sufficient objection to the procedure prescribed by the act as to unknown claimants. The legislature may prescribe novel and unprecedented methods of procedure, provided they afford the parties affected substantial securities against arbitrary and unjust spoliation, which are embraced within the system of jurisprudence prevailing throughout the land.

ID.—NECESSITY OF SETTling TITLES AS TO UNKNOWN CLAIMANTS.—The

power of the state to settle titles within its borders and to allow a substituted service should not be limited to known claimants who cannot be served; but in order to exercise this power to the fullest extent it is necessary that it should be made to operate on all interests, known and unknown. A proceeding to settle titles against all the world necessarily involves getting rid of unknown claimants, and such claimants cannot be dealt with by personal service.

ID.—CONSTRUCTION OF STATUTE—REASONABLE DILIGENCE REQUIRED TO

DISCOVER ADVERSE CLAIMANTS—MEANS OF KNOWLEDGE.—The statute must be construed as requiring the exercise of reasonable diligence on the part of the plaintiff to discover adverse claimants, and when discovered to make them parties defendant; and the means of knowledge in this respect must be deemed equivalent to actual knowledge. The plaintiff is under the duty of inquiry as to the names and residences of all persons who may claim an adverse interest. So construed, the statute does not, nor can an action prosecuted under it, deprive any person of his property without due process of law.

ID.—PROCEEDINGS JUDICIAL AND NOT ADMINISTRATIVE.—The proceeding

to establish title of record under the act is judicial, and not administrative, in its nature. Whenever the law confers a right and authorizes an application to a court of justice to enforce that right, the proceedings upon the application are judicial in their nature; and it is immaterial whether, in response to the notice given to all claimants, known and unknown, there is or is not any appearance to contest the right.

ID.—SPECIAL LEGISLATION—REGULATING PRACTICE OF COURTS.—The fact

that the act in controversy makes provisions regulating the practice in the actions therein provided for, which are not to be found in other judicial proceedings, does not necessarily make it special legislation forbidden by subdivision 3 of section 25 of article IV of the constitution, prohibiting the passage of special laws "regulating the

practice of courts of justice." The proceeding created by the act is sufficiently distinct and different from ordinary civil actions covered by the general rules of the code to justify the creation of a class of actions characterized by the special rules of procedure provided for in the act.

1D.—DESTRUCTIVE AGENCY SPECIFIED.—The statute is not special legislation merely because it enumerates destruction of records by earthquake, fire, or flood. The three agencies named are those which are most likely to occur in this state, and are the only ones which, so far as we know, have caused any considerable destruction of public records. These facts furnish ample ground for limiting the operation of the act to the cases to which it has been made applicable.

1D.—SUFFICIENCY OF TITLE.—The title of the act sufficiently complies with section 24 of article IV of the constitution.

PETITION for Writ of Mandate to the Superior Court of the City and County of San Francisco. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Garret W. McEnerney, Walter Rothchild, Joseph H. Mayer, Joseph Hutchinson, James S. Hutchinson, Chas. S. Wheeler, *Amicus Curiae*, and J. F. Bowie, Van Fleet & Mastick, William H. H. Hart, and Bishop & Hoefler, *Amici Curiae*, for Petitioner.

The state may, as sovereign over lands situated within it, provide for an adjudication of title, in a proceeding *in rem* or in the nature of a proceeding *in rem*, which shall be binding upon all persons known and unknown. (*State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Perkins v. Wakeham*, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51; *McLaughlin v. McCrory*, 55 Ark. 442, 29 Am. St. Rep. 56, 18 S. W. 762; *Hall v. Meloin*, 62 Ark. 439, 54 Am. St. Rep. 301, 35 S. W. 1109; *McMahon v. Smith*, 69 Ark. 591, 65 S. W. 459; *Hanscom v. Hanscom*, 6 Colo. App. 97, 39 Pac. 885; *Harris v. Palmore*, 74 Ga. 273; *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20; *Pile v. McBratney*, 15 Ill. 314; *Smith v. Stevens*, 82 Ill. 554; *Bertrand v. Taylor*, 87 Ill. 235; *Mulvey v. Gibbons*, 87 Ill. 367; *Thornton v. Houtze*, 91 Ill. 199; *Heacock v. Lubuke*, 107 Ill. 396; *Heacock v. Hosmer*, 109 Ill. 245; *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777; *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *People v.*

Simon, 176 Ill. 165, 68 Am. St. Rep. 175, 52 N. E. 910, 44 L. R. A. 801; *Unknown Heirs v. Kimball*, 4 Ind. 546, 58 Am. Dec. 638; *State v. Scanlon*, 2 Ind. App. 320, 28 N. E. 426; *Quarl v. Abbett*, 102 Ind. 233, 52 Am. Rep. 662; *Otis v. De Boer*, 116 Ind. 531, 19 N. E. 317; *Mason v. Messenger*, 17 Iowa, 264; *Guise v. Early*, 72 Iowa, 283, 33 N. W. 683; *Williams v. Westcott*, 77 Iowa, 332, 14 Am. St. Rep. 287, 42 N. W. 314; *Ruppin v. McLaughlin*, 122 Iowa, 343, 98 N. W. 153, 154; *Venable v. Dutch*, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 262; *Dillon v. Heller*, 39 Kan. 599, 18 Pac. 693; *Covington etc. R. R. Co. v. Bowler*, 9 Bush (Ky.) 468; *Blight v. Banks*, 6 Mon. T. B. (Ky.) 192, 220, 17 Am. Dec. 136; *Benningfield v. Reed*, 8 B. Mon. (Ky.) 102; *Wuntzel v. Landry*, 39 La. Ann. 312, 1 South. 893; *Young v. Upshur*, 42 La. Ann. 362, 21 Am. St. Rep. 381, 7 South. 557; *Coombs v. Persons Unknown*, 82 Me. 326, 19 Atl. 826; *Loring v. Hildreth*, 170 Mass. 328, 64 Am. St. Rep. 301, 49 N. E. 652, 40 L. R. A. 127; *Tyler v. Court of Registration*, 175 Mass. 71, 55 N. E. 912, 51 L. R. A. 433; *Lane v. Innis*, 43 Minn. 137, 45 N. W. 4; *Cousins v. Alworth*, 44 Minn. 505, 47 N. W. 169, 10 L. R. A. 504; *Ware v. Easton*, 46 Minn. 180, 48 N. W. 775; *Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212; *Inglee v. Weller*, 53 Minn. 197, 55 N. W. 117; *Corson v. Shoemaker*, 55 Minn. 386, 57 N. W. 134; *McClymond v. Noble*, 84 Minn. 329, 87 Am. St. Rep. 354, 87 N. W. 838; *State v. Westfall*, 85 Minn. 437, 89 Am. St. Rep. 571, 89 N. W. 175, 57 L. R. A. 297; *Dewey v. Kimball*, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704; *Belcher v. Mhoon*, 47 Miss. 613; *Brown v. Levee Commissioners*, 50 Miss. 468; *State v. Staley*, 76 Mo. 158; *Charles v. Morrow*, 99 Mo. 638, 12 S. W. 903; *Coombs v. Crabtree*, 105 Mo. 292, 16 S. W. 830; *Meyers v. McRay*, 114 Mo. 377, 21 S. W. 730; *Rohrer v. Ader*, 124 Mo. 24, 27 S. W. 606; *Peters v. Dannels*, 5 Neb. 460; *Keene v. Sallenbach*, 15 Neb. 200, 18 N. W. 75; *Watson v. Ulbrich*, 18 Neb. 186, 24 N. W. 732; *Lantry v. Parker*, 37 Neb. 353, 55 N. W. 962; *Scarborough v. Myrick*, 47 Neb. 795, 66 N. W. 867; *Fowler v. Brown*, 51 Neb. 414, 71 N. W. 54; *Allen v. Allen*, 11 How. Pr. 277; *Wheeler v. Scully*, 50 N. Y. 667; *Abbott v. Curran*, 98 N. Y. 665; *Moran v. Conoma*, 13 N. Y. Supp. 625; *Guyer v. Raymond*, 29 N. Y. Supp. 395, 8 Misc. Rep. 606; *People v. Ryder*, 65 Hun, 175, 19 N. Y. Supp. 977; *Sandiford v. Town of Hempstead*, 90

N. Y. Supp. 76, 79, 97 App. Div. 163; *Bernhart v. Brown*, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402; *Sullivant v. Weaver*, 10 Ohio, 278; *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613; *Pool v. Lamon* (Tex. Civ. App.), 28 S. W. 363; *Bassett v. Sherrod*, 13 Tex. Civ. App. 327, 35 S. W. 312; *American Building Assoc. v. Matthews*, 13 Tex. Civ. App. 425, 35 S. W. 690; *Külmer v. Brown*, 28 Tex. Civ. App. 420, 67 S. W. 1090; *Byrnes v. Sampson*, 74 Tex. 79, 11 S. W. 1073; *Talliaferro v. Butler*, 77 Tex. 578, 14 S. W. 191; *Hardy v. Beatty*, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778; *Kane v. Rock River Canal Co.*, 15 Wis. 179; *Truesdell v. Rhodes*, 26 Wis. 215; *Gray v. Gates*, 37 Wis. 614; *Bennett v. Fenton*, 41 Fed. 283, 10 L. R. A. 500; *Porter Land etc. Co. v. Baskin*, 43 Fed. 323; *Morris v. Graham*, 51 Fed. 53; *Bickell v. Farrell*, 82 Fed. 220; *Ormsby v. Ottman*, 85 Fed. 492, 29 C. C. A. 295; *Morrison v. Marker*, 93 Fed. 692; *Connor v. Tennessee etc. Ry. Co.*, 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687; *Johnson v. Hunter*, 127 Fed. 219; *York County Sav. Bank v. Abbot*, 131 Fed. 984; *Parker v. Overman*, 18 How. 137; *United States v. Fox*, 94 U. S. 315, 320; *Pennoyer v. Neff*, 95 U. S. 714, 727, 734; *Huling v. Kaw Valley Ry. etc. Co.*, 130 U. S. 559, 9 Sup. Ct. 603; *Mellen v. Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557; *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554; *Dick v. Foraker*, 155 U. S. 404, 15 Sup. Ct. 124; *Lynch v. Murphy*, 161 U. S. 247, 16 Sup. Ct. 523; *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. 585; *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410; *Overby v. Gordon*, 177 U. S. 221, 20 Sup. Ct. 603; *Leigh v. Green*, 193 U. S. 79, 24 Sup. Ct. 390.) The statute is not unconstitutional. All presumptions favor its validity. (*Bourland v. Hildreth*, 26 Cal. 180; *University of California v. Pearnard*, 57 Cal. 612; *People v. Hayne*, 83 Cal. 111, 17 Am. St. Rep. 211, 23 Pac. 1, 7 L. R. A. 348; *Bates v. Gregory*, 89 Cal. 394, 26 Pac. 891; *In re Madera Irr. Dist.*, 92 Cal. 307, 27 Am. St. Rep. 106, 28 Pac. 272, 675; *Woodward v. Fruitvale Dist.*, 99 Cal. 554, 34 Pac. 239; *De Yoe v. Superior Court*, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28; *In re Finley*, 1 Cal. App. 198, 81 Pac. 1041; *Munn v. Illinois*, 94 U. S. 113; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257; *Booth v. Illinois*, 184 U. S. 426, 22 Sup. Ct. 425; *Otis v. Parker*, 187 U. S. 609, 23 Sup. Ct. 168; *Cooley on Con-*

stitutional Limitations, 7th ed., p. 252.) There is no want of due process of law, by reason of constructive notice therein provided for. (*Hahn v. Kelley*, 34 Cal. 391, 417, 94 Am. Dec. 742; *Eitel v. Foote*, 39 Cal. 439; *Arnold v. Kahn*, 67 Cal. 472, 8 Pac. 36; *Crall v. Poso Irr. Dist.*, 87 Cal. 140, 147, 26 Pac. 797; *Otis v. Dargan*, 53 Ala. 178; *Martin v. King*, 72 Ala. 354; *Hurlburt v. Thomas*, 55 Conn. 181, 3 Am. St. Rep. 343, 10 Atl. 556; *Bertrand v. Taylor*, 87 Ill. 235; *Beard v. Beard*, 21 Ind. 321; *Quarl v. Abbett*, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476; *Essig v. Lower*, 120 Ind. 239, 21 N. E. 1090; *Mason v. Messenger*, 17 Iowa, 261; *Burlington etc. R. R. Co. v. Dey*, 82 Iowa, 312, 31 Am. St. Rep. 473, 48 N. W. 98, 12 L. R. A. 436; *Gülchrist v. Schmeidling*, 12 Kan. 262; *Burnam v. Commonwealth*, 1 Duv. 210; *Covington etc. R. R. Co. v. Bowler*, 9 Bush, 468; *Tyler v. Court of Registration*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; *Loring v. Hildreth*, 170 Mass. 328, 64 Am. St. Rep. 301, 49 N. E. 652, 40 L. R. A. 127; *Shepherd v. Ware*, 46 Minn. 179, 24 Am. St. Rep. 212, 48 N. W. 773; *Corson v. Shoemaker*, 55 Minn. 386, 57 N. W. 134; *State v. Westfall*, 85 Minn. 437, 89 Am. St. Rep. 571, 89 N. W. 175, 57 L. R. A. 297; *United States Trust Co. v. United States Fire Ins. Co.*, 18 N. Y. 200; *Happy v. Mosher*, 48 N. Y. 313; *People v. Essex County*, 70 N. Y. 228; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557; *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554; *Huling v. Kaw Valley Ry. etc. Co.*, 130 U. S. 559, 9 Sup. Ct. 603; Freeman on Judgments, sec. 570; 10 Am. & Eng. Ency. Law, 2d ed. 299.) The legislature has power to establish new remedies, or to change common-law remedies, or establish special proceedings, without violating the principle of "due process of law." (*Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 292; *Tyler v. Court of Registration*, 175 Mass. 71, 55 N. E. 812; *People v. Essex County*, 70 N. Y. 228; *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890, 1009; *Iowa R. R. Co. v. Iowa*, 160 U. S. 389, 16 Sup. Ct. 344; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663; *Kennard v. Louisiana*, 92 U. S. 480; *Ex parte Wall*, 107 U. S. 265, 289, 2 Sup. Ct. 569.) The requirement or non-requirement of an affidavit of diligence is discretionary with the legislature, and is not involved in "due process of law." No constitutional requirement provides that any fact shall be proved by affidavit. Affidavits of diligence are not required in this state for publi-

cation against non-residents. (*Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; *Furnish v. Mullan*, 76 Cal. 648, 18 Pac. 854.) Where no affidavit is required the plaintiff cannot shut his eyes against the means of knowledge of claimants, and treat them as unknown, where reasonable inquiry would ascertain the fact of known claimants, and the duty of such inquiry with ordinary diligence makes the distinction between known and unknown claimants a fair one. (*Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; *State v. Westfall*, 85 Minn. 437, 89 Am. St. Rep. 571, 89 N. W. 175; *Tricker v. Wells*, 12 Vt. 240; *Moore v. Quint*, 44 Vt. 97; *Farnham v. Thomas*, 56 Vt. 35.) An "unknown" party must be unknown to all of the plaintiffs. (*Kane v. Rock River Canal Co.*, 15 Wis. 179; *Jeffreys' Heirs v. Hand's Heirs*, 7 Dana (Ky.) 89.) Ignorance of name must be real and not feigned. (*Rosencrantz v. Rozen*, 40 Cal. 489.) The means of knowledge is equivalent to knowledge. (*Wood v. Carpenter*, 101 U. S. 143.) The judgment, where the statute prescribes no affidavit of diligence, involves an adjudication that the case was a proper one for constructive service. (*Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613, and cases cited; 87 Am. St. Rep. 363, note.) There is no "administrative proceeding" here involved; but the adjudication provided for by the statute in question is an adjudication in a "judicial proceeding," after an opportunity afforded to all claimants to be heard, and is "due process of law" in that regard, although there may be no appearance of adverse parties and no actual controversy. (*Robbins v. City of Chicago*, 4 Wall. 672; *In re Pacific Ry. Commission*, 32 Fed. 241, 12 Sawy. 559; *Ormsby v. Webb*, 134 U. S. 47, 10 Sup. Ct. 478; *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175, 52 N. E. 910, 44 L. R. A. 801; *Tyler v. Court of Registration*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; *State v. Westfall*, 85 Minn. 437, 89 Am. St. Rep. 571, 89 N. W. 175; *Worthen v. Ratcliffe*, 42 Ark. 330; 24 Am. & Eng. Ency. Law, 2d ed., 735.) Even *ex parte* proceedings in courts may involve the exercise of judicial power, though there is no controversy. (*In re La Societe Francaise*, 123 Cal. 525, 56 Pac. 458; Code Civ. Proc., secs. 1227, 1275-1279, 1723, 1811; *Bruce v. Fox*, 1 Dana (Ky.) 447; *McAllister v. Hamlin*, 83 Cal. 361, 23 Pac. 357; *Stevens v. Truman*, 127 Cal. 155, 59 Pac. 397; *Charles Greer's Son v. Salas*, 31 Fed.

106; *In re An Alien*, 7 Hill, 137; *Ex parte Milligan*, 4 Wall. 2.) Special proceedings, as well as actions, are judicial proceedings. (Code Civ. Proc., secs. 20-22, 30.) Any legal application to a court of justice seeking a remedy which the law affords is a judicial proceeding. (*Evans v. Evans*, 105 Ind. 204, 5 N. E. 24, 718; *State v. Newell*, 13 Mont. 302, 34 Pac. 28; *Sinking Fund Cases*, 99 U. S. 761; *Martin v. Simpkins*, 20 Cal. 438, 38 Pac. 1092.) Proceedings *in rem* are usually non-controversial judicial proceedings. (*Gaines v. Fuentes*, 92 U. S. 10, 21; *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Good v. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145, 51 Pac. 681; *Toland v. Earl*, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914.) Judicial proceedings against "unknown claimants" are recognized in the statutes of this state. (Code Civ. Proc., secs. 749 et seq., 753 et seq., 814 et seq., 1664; Pol. Code, sec. 3635 et seq.; Stats. 1897, 30; 1899, 106.) Judicial proceedings *in rem* or in that nature are also fully recognized. (*Lower Kings River Dist. v. McCullah*, 124 Cal. 174, 175, 56 Pac. 887; *Reclamation Dist. v. Sels*, 117 Cal. 164, 166, 49 Pac. 131; *In re Tracey*, 136 Cal. 385, 69 Pac. 20; *In re De Leon*, 102 Cal. 541, 36 Pac. 864; *In re Barton*, 93 Cal. 463, 29 Pac. 36.) Judgments *in rem* bind all persons who might have been parties anywhere in the world. (*State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Kearney v. Kearney*, 72 Cal. 591, 15 Pac. 769; *Wm. Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323; *In re Blythe*, 110 Cal. 234, 42 Pac. 643; *Estate of Hinckley*, 58 Cal. 457; *Rialto Irr. Dist. v. Brandon*, 103 Cal. 387, 37 Pac. 484; *Crall v. Poso Irr. Dist.*, 87 Cal. 140, 26 Pac. 797; *Burris v. Kennedy*, 108 Cal. 336, 337, 41 Pac. 458; *Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190, 32 Pac. 324; *State v. Westfall*, 85 Minn. 437, 89 Am. St. Rep. 571, 89 N. W. 175; *Castrique v. Imrie*, 4 H. L. 414, 429; *Cross v. Armstrong*, 44 Ohio St. 613, 10 N. E. 160; *Broderick's Will*, 21 Wall. 503; Freeman on Judgments, ch. 28; Chand. on Res Adjudicata, ch. 8.) The act violates no principle of uniformity of operation, and is not special legislation. It is sufficient that it provides for a distinct class of proceedings, suitable to the nature of the case and applicable to all cases and persons standing in the same intrinsic category. (*Abell v. Clark*, 84 Cal. 230, 24 Pac. 383; *Escondido High School Dist. v. Seminary*, 130 Cal. 128, 136, 62 Pac. 408; *Potwin v. Johnson*, 108 Ill.

70; *Arms v. Ayer*, 192 Ill. 601, 88 Am. St. 357, 61 N. E. 851; *McAurich v. Railroad Co.*, 20 Iowa, 338.) The question whether a more general law could be made applicable is matter of legislative discretion and judgment, not open to the courts. (*People v. McFadden*, 81 Cal. 499, 15 Am. St. Rep. 66, 22 Pac. 851; *People v. Mallender*, 132 Cal. 217, 64 Pac. 299.) Rules of practice made generally applicable to a class of special cases are within the legislative control and not violative of the restriction against special legislation regulating the practice of courts of justice. (*McDonald v. Conniff*, 99 Cal. 386, 390, 34 Pac. 71; *Boggs v. Ganear*, 148 Cal. 712, 722, 84 Pac. 195, 199; *Cramer v. Tuttle*, 72 Cal. 12, 12 Pac. 869; *De Yoe v. Superior Court*, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28; *Jensen v. Fricke*, 133 Ill. 171, 24 N. E. 515, 516.) The statute has a limited and temporary operation in a case of emergency, and that is a sufficient ground for special classification. (*Flynn v. Little Falls*, 74 Minn. 180, 78 N. W. 166; *Alexander v. Duluth*, 77 Minn. 445, 80 N. W. 623, 624; *Land Co. v. Soper*, 39 Iowa, 112.) The title of the act is not objectionable. (*De Yoe v. Superior Court*, 140 Cal. 472, 98 Am. St. Rep. 73, 74 Pac. 28.)

Gaillard Stoney, John J. Lermen, John Garber, *Amicus Curia*, Page, McCutchen & Knight, *Amici Curia*, A. E. Bolton, C. S. Farquar, and William B. Beazley, *Amici Curia*, for Respondent.

The act in question violates the provisions of the state and federal constitutions requiring "due process of law" to divest the citizen of his property rights. (Cooley's Constitutional Limitations, 7th ed., 506.) The nature and not the name of the proceeding is to be considered on the question of "due process of law." (*Brown v. Board of Levee Comrs.*, 50 Miss. 468, 480; *State v. Guilbert*, 56 Ohio St. 575, 60 Am. St. Rep. 756, 47 N. E. 551.) The nature of the proceeding called for by the act is that of an action to establish and quiet title to real property, which is not *in rem*, but rather *in personam*, or, at most, quasi *in rem*, in which only parties and privies to the action are concluded. (Black on Judgments, sec. 793; *Freeman v. Alderson*, 119 U. S. 188, 7 Sup. Ct. 165; *Hollingsworth v. Barbour*, 4 Pet. 466, 475; *McDonald v. McCoy*, 121 Cal. 55,

69, 53 Pac. 421; *Bear Lake County v. Budge*, 9 Idaho, 203, 108 Am. St. Rep. 179, 75 Pac. 614; *Hill v. Henry*, 66 N. J. Eq. 150, 57 Atl. 554; *Andrews v. Quayaquil etc. Ry. Co.*, (N. J. Eq.), 60 Atl. 568; Loring, J., in *Tyler v. Court of Registration*, 175 Mass. 71, 55 N. E. 812; Benedict's Admiralty, p. 384; *Mankin v. Chandler*, 2 Brock. 125, Fed. Cas. No. 9030; *Cole v. The Brandt*, 1 Betts, 361, Fed. Cas. No. 2978; *The Heinrich Bjorn*, 10 P. D. 44.) Holders of non-conflicting equitable titles cannot be divested of their rights except by a suit *in personam*. (*Remer v. McKay*, 54 Fed. 432.) In an action to establish and quiet title to land "due process of law" requires personal service of summons upon the defendants, if possible, with due diligence, and it is only in cases of necessity that constructive service by publication is permissible. (*Bardwell v. Anderson*, 44 Minn. 97, 20 Am. St. Rep. 547, 46 N. W. 315; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557; *Perkins v. Wakeham*, 86 Cal. 580, 581, 21 Am. St. Rep. 67, 25 Pac. 51; *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; *State v. Guilbert*, 56 Ohio St. 575, 60 Am. St. Rep. 756, 47 N. E. 551, 38 L. R. A. 519; *Leigh v. Green*, 64 Neb. 533, 101 Am. St. Rep. 592, 90 N. W. 255; *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175, 52 N. E. 910; *Bear Lake County v. Badge*, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 615; *Brown v. Board of Levee Comrs.*, 50 Miss. 468; *Tyler v. Court of Registration*, 175 Mass. 71, 55 N. E. 812; *Hill v. Henry*, 66 N. J. Eq. 150, 57 Atl. 554; *Andrews v. Quayaquil etc. Ry. Co.*, [N. J. Eq.], 60 Atl. 568.) The act in question requires no diligence to be shown by evidentiary facts, which showing is jurisdictional, and cannot be dispensed with. (*Forbes v. Hyde*, 31 Cal. 342, 349, 354.) The act contemplates an *ex parte* proceeding without controversy or the naming of any defendants, and is not a proper invocation of judicial power or jurisdiction. (Austin's Philosophy of Jurisprudence, sec. 1036; Miller on Constitution, 348; 3 Blackstone, 25, 66; *Cashman v. Cashman's Heirs*, 123 Mo. 549, 27 S. W. 549; *Tregea v. Modesto*, 164 U. S. 179, 17 Sup. Ct. 52; *Reid v. Darby*, 10 East. 143; *Denny v. Bennett*, 128 U. S. 489, 9 Sup. Ct. 34; *Cushing v. Laird*, 107 U. S. 69, 2 Sup. Ct. 196; *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773; *Blagge v. Moore*, 6 Tex. Civ. App. 359, 23 S. W. 470; *Harvey v. Harvey*, 73 N. H. 106, 59 Atl. 621; *Rodley v. Curry*, 120

Cal. 541, 52 Pac. 999; *Third-St. etc. Ry. Co. v. Lewis*, 173 U. S. 457, 19 Sup. Ct. 451; *Attorney-General v. Avon*, 3 DeG. J. & S. 637; *Case of Prohibitions*, 12 Coke, 63; *Silver v. Schuylkill County*, 32 Pa. St. 357; *Bradstreet v. Neptune Ins. Co.*, 3 Sum. 600, Fed. Cas. No. 1793; *Georgia v. Stanton*, 6 Wall. 50; *De Camp v. Archibald*, 50 Ohio St. 618, 40 Am. St. Rep. 692, 35 N. E. 1056; *In re Canadian Northern Ry. v. International Bridge Co.*, 7 Fed. 653; *Brewington v. Lowe*, 11 Ind. 21, 48 Am. Dec. 349; *Fuller v. Colfax County*, 14 Fed. 177, 178, 4 McCrary, 535; *Lord v. Veazie*, 8 How. 255, 12 L. ed. 1069; *Livingston v. D'Orgenoy*, 108 Fed. 469; *Carroll v. Lessee*, 16 How. 275, 286, 287; *Dunne v. State*, 163 Ind. 317, 71 N. E. 890; *Taylor v. Place*, 4 R. I. 324; *In re Senate Resolution*, 12 Colo. 466, 21 Pac. 478; *State v. Fleming*, 70 Neb. 523, 97 N. W. 1063; *Ex parte County Council*, 1 Q. B. 725; *Schooner Tilton*, 5 Mason, 465, 477, Fed. Cas. No. 14054.)

The division of powers, under the constitution, requires the judicial power to be distinct, without encroachment of administrative function, and that it be construed in the light of the common law, which requires the judicial power to determine a present controversy between parties to an action. (*State v. Harmon*, 31 Ohio St. 250; *Sweet v. Syracuse*, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; *Kilbourn v. Thompson*, 103 U. S. 168, 190; *Lady Langdale v. Briggs*, 8 De G. M. & G. 391; *Ferrand v. Wilson*, 4 Hare, 385; *Rooke v. Lord Kensington*, 25 L. J. (N. S.) Ch. 795; *Southern Ry. Co. v. State*, 116 Ga. 276, 42 S. E. 508; *Mayor of Edinburgh*, 1 Macph. 887, 1 Sessions Cases, 3d series; *Cashman v. Cashman's Heirs*, 123 Mo. 647, 27 S. W. 549; *Lathrop v. Stuart*, 5 McLean, 167, Fed. Cas. No. 8113; *Blagge v. Moore*, 6 Tex. Civ. App. 359, 23 S. W. 470; *Ellis v. Davis*, 109 U. S. 486, 3 Sup. St. 327; *Lloyd v. Wayne, Circuit Judge*, 56 Mich. 236, 56 Am. St. Rep. 378, 23 N. W. 28; *State v. Guinotte*, 113 Mo. App. 399, 86 S. W. 884.)

The act in question is void as being special legislation in matters of practice differing wholly from the practice required in civil actions, as to service by publication (Code Civ. Proc., secs. 413, 749), as to time for appearance (Code Civ. Proc., sec. 407), as to showing of diligence required for publication (Code Civ. Proc., secs. 412, 749), as to the index of actions (Pol Code, sec. 4204), as to notice of *lis pendens* (Code Civ. Proc., sec. 409, 712), and as respects practice upon appeals,

no defendants being named who have a right of appeal upon the record, and the plaintiff himself having no power to serve any notice of appeal, since all facts conferring jurisdiction upon appeal must appear upon the record appealed from (*In re Crooks' Estate*, 125 Cal. 459, 58 Pac. 89; *Constitution v. Woodworth*, 2 Ill. (1 Scam.) 511; *The Spark v. Lee Choy Chum*, 1 Sawy. 713, Fed. Cas. No. 13206; *Aiken v. Smith*, 54 Fed. 894, 4 C. C. A. 652; *Handley v. Anderson*, 5 Ind. Tr. 186, 82 S. W. 716), and practically allowing a confiscation of property of a person having no reasonable notice of the proceedings. (*In re Cook*, 86 App. Div. 586, 83 N. Y. Supp. 1009, 1011.) Decrees entered under the act in question are commercially valueless. (*Cella County Commrs. v. Bohlinger*, 147 Fed. 419; *Baart v. Martin* (Dist. Court of Minn.), Minn. Journal, April 8, 1905, 108 N. W. 945.)

SLOSS, J.—In June, 1906, the legislature of this state, having been convened in extraordinary session to legislate concerning certain needs developed by the disaster of April 18, 1906, enacted, among other statutes, one entitled "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records."

The present proceeding is an application for a writ of mandate. The petitioner herein filed a complaint, as provided by the act above referred to, and applied to the respondent, judge of the superior court in which its complaint had been filed, for an order for publication of summons. The respondent declined to make the order upon the ground that the act in question violated certain provisions of both the federal and state constitutions. The purpose of this proceeding being to compel the judge of the lower court to make the order for publication, as requested, the real, and substantially the only, question herein involved is whether or not the above-mentioned act is a valid exercise of legislative power. The facts alleged in the petition are not denied, and the matter now comes before the court upon a demurrer to the petition. In order to properly state and discuss the constitutional points made in support of the demurrer, it will be well to give a somewhat full statement of the provisions of the act in question.

The act provides that whenever the public records in the office of a county recorder are lost or destroyed, in whole or in any material part, by flood, fire, or earthquake, any person who claims an estate of inheritance or for life in, and who is by himself or his tenant or other person in the actual and peaceable possession of any real property in such county, may bring and maintain "an action *in rem* against all the world" in the superior court of the county where the land is situate "to establish his title to such property and to determine all adverse claims thereto." (Sec. 1.) The action is commenced by the filing of a verified complaint in which the party commencing the same is named as plaintiff, and the defendants are described as "all persons claiming any interest in or lien upon the real property herein described, or any part thereof." The complaint is to contain a statement of the facts enumerated in section 1 of the act, together with a particular description of the real property, and a specification of the estate or interest of the plaintiff therein. (Sec. 2.) The act provides for the issuing of a summons upon the filing of the complaint. The summons is directed to "all persons claiming an interest in or lien upon the real property herein described, or any part thereof," and requires them to appear within three months after the first publication of the summons, and to set forth what interest or lien, if any, they have upon the real property in question, a description of which is to be contained in the summons. At the time of the filing of the complaint the plaintiff must file with the same his affidavit fully and explicitly setting forth and showing:

1. The character of his interest, the duration of its existence, and from whom it was obtained;
2. Whether or not he has ever made any conveyance affecting the property, and if so, when and to whom, and a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon;
3. That he does not know and has never been informed of any other person who claims or may claim any interest in or lien upon the property adversely to him, or if he does know and has been informed of any such person, then the name and address of such person.

If the plaintiff is unable to state one or more of the matters required, he shall set forth and show fully and explicitly the reasons for such inability. This affidavit is

made to constitute a part of the judgment-roll. (Sec. 5.) The summons is required to be published in a newspaper of general circulation published in the county in which the action is brought, the particular newspaper to be designated by an order of the court or a judge thereof. The summons is to be published at least once a week for a period of two months and to each publication there must be appended a memorandum giving the date of the first publication of the summons. There must also be appended to the summons a memorandum giving the names of any persons who are known to the plaintiff to claim any interest in the property adversely to the plaintiff, if the names of such persons appear in the affidavit filed with the complaint. (Sec. 4.) If the affidavit discloses the name of any person claiming any interest adversely to the plaintiffs, the summons must be personally served upon such person, if he can be found within the state, together with a copy of the complaint and a copy of the affidavit and memoranda provided for in section 4, and if the person disclosed by the affidavit resides out of the state, a copy of the summons, memoranda, complaint, and affidavit must be sent to him by mail within fifteen days after the first publication of the summons. If he resides within the state and cannot with due diligence be found therein before the expiration of the period of the publication of summons, then the copies shall be mailed to him forthwith upon the expiration of the period of publication. (Sec. 6.) In addition to the service by publication and the personal service and mailing above spoken of, the act provides that a copy of the summons and of the memoranda referred to shall be posted in a conspicuous place on each separate parcel of the property described in the complaint within fifteen days after the first publication of the summons. (Sec. 4.) Upon the completion of the publication and posting of the summons and its service upon and mailing to the persons, if any, upon whom it is directed to be personally served "the court shall have full and complete jurisdiction over the plaintiff and the said property and of the person of every one having or claiming any estate, right, title or interest in or to, or lien upon, said property or any part thereof, and shall be deemed to have obtained the possession and control of such property

for the purposes of the action and shall have full and complete jurisdiction to render the judgment therein which is provided for in this act." (Sec. 7.) Any person having, or claiming any estate, right, title, or interest in, or lien upon, the property may at any time within three months from the first publication of the summons appear and make himself a party to the action by pleading to the complaint by a verified answer setting forth the estate or interest claimed. (Sec. 8.) The plaintiff and every defendant claiming any affirmative relief must at the time of filing his pleading record in the office of the recorder a notice of the pendency of the action containing a particular description of the property affected, and this notice is to be recorded in a book devoted exclusively to the recordation of said notices, and is to be entered upon a map of the land, to be kept by the recorder for that purpose, with a reference to the date, book, and page of the record of such notice. (Sec. 9.) No judgment is to be given by default, but the court must require proof of the facts alleged in the pleadings. (Sec. 10.) The judgment when given "shall ascertain and determine all of the estate, rights, title, interests and claims in and to said property, and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, or whether the same consists of mortgages or liens of any description, and shall be binding and conclusive upon every person who at the time of the commencement of the action had or claimed any estate, right, title or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action." A certified copy of the judgment is to be recorded in the office of the recorder. (Sec. 11.) All provisions and rules of law relating to evidence, pleading, practice, new trial, and appeal applicable to other civil actions are, except as otherwise provided in the act, made applicable to this action. (Sec. 12.) The act provides that where one judgment under it has been entered as to any real property, no other action relative to the same property shall be tried until proof is first made to the court that all persons who appeared in the first action have been served with the papers in the new action, at least a month before the expiration of the time to plead. (Sec. 14.) Ex-

ecutors, administrators, guardians, or other persons holding the possession of property in the right of another may maintain the action as plaintiff, or appear and defend. (Sec. 15.) The remedies provided for by the act are to be deemed cumulative and in addition to any other remedy now or hereafter provided by law for quieting or establishing the title to real property. (Sec. 17.) All actions authorized by the act must be commenced before July 1, 1909. (Sec. 18.)

The general purpose of the statute is plain. It was intended to provide a method whereby owners in possession of real estate in counties where the records are destroyed to such an extent as to make it impossible to trace a record title may secure a decree which shall furnish a publicly authenticated evidence of title. It is hardly necessary to point out that under the system of registration of land titles which has grown up in all of the states of this Union it is practically essential to the security of ownership in real property that there exist some method by which the title can be made clear of record. Without regard to the effect of duly recorded instruments as constructive notice (whether or not the record remains in actual existence), the registration of titles has become so thoroughly imbedded in our system of dealing with lands that a title which cannot be traced and established by some form of public record is practically unmerchantable. It is of course true that for many centuries lands have been transferred in England, whence we have, in the main, derived our system of real property law, without any considerable resort to a public recording scheme. But in this country the system of registration has become so completely established that the courts can take judicial notice of the fact that in the great majority of cases parties dealing in real estate rely for the proof of their titles upon the chain of title that will be disclosed by an examination of the records, and in a small degree, if at all, upon the possession of the original instruments composing that chain. In many instances, indeed, these instruments are not preserved for any great length of time.

It is also matter of common knowledge that in the city and county of San Francisco at least, if not in other counties, the disaster of April last worked so great a destruction of the

public records as to make it impossible to trace any title with completeness or certainty. That some provision was necessary to enable the holders and owners of real estate in this city to secure to themselves such evidence of title as would enable them not only to defend their possession, but to enjoy and exercise the equally important right of disposition, is clear. These considerations are suggested not with a view to arguing that the necessity for some act of this kind affords any ground for disregarding constitutional provisions, if the statute be found to conflict with such provisions, but rather as a guide to determine the real scope and purpose of the act, and to emphasize the rule so often laid down by all the courts that in passing upon the constitutionality of an act of the legislature every presumption and intendment in favor of the validity of the enactment are to be given effect.

1. One of the principal objections made to the act is that by the decree persons who may have an interest in the land are deprived of their property without due process of law. This contention is based upon the proposition that the proceeding created by this statute is a proceeding *in personam*, and not *in rem*, and that in personal actions a binding judgment cannot be rendered against the persons to be affected without giving them personal notice of the proceeding and an opportunity to be heard. It is conceded by the learned counsel for respondent, as it needs must be, that if this is strictly a proceeding *in rem* such personal notice is not required. Undoubtedly the act, so far as the language of the legislature can have this effect, attempted and intended to create a proceeding which should have the force and effect of a proceeding *in rem*. Section 1 describes the proceeding as "an action *in rem* against all the world." Section 11 provides that the judgment shall be binding and conclusive upon every person who at the time of the commencement of the action had or claimed any estate, right, title, or interest in or to the property.

It is, however, argued that if the proceeding is in its essential features one *in personam*, the legislature cannot, by merely designating it "*in rem*," cut off the rights of persons interested without providing as to them such notice and opportunity to be heard as are requisite to constitute due process in

personal actions. That the mere title or designation which is given by the legislature to a proceeding cannot change its substantial character or alter the rights of parties to it is, of course, plain enough. What, then, in its essential characteristics, is a proceeding *in rem*? If, as contended by respondent, it is one "to enforce a liability for which the *res* is liable, irrespective of who owns it,—such a liability that the *res* can properly be impleaded as the respondent who is liable" (quoting the language of Loring, J., dissenting, in *Tyler v. Judges of Court of Registration*, 175 Mass. 71, [55 N. E. 812], the action provided for by the present statute does not come within the definition. But neither do some other proceedings conceded to be strictly *in rem*, such as the probate of wills, the distribution of estates, and the special proceeding created by section 1664 of the Code of Civil Procedure to "ascertain and declare the rights of all persons" to an estate. Even though, viewed as a matter of historical analogy, there may have been at common law no proceeding *in rem* which was at all similar to the one here provided, it may be asked why the state, in exercising its control over the ascertainment and settlement of title to real estate within its borders, may not create a suit *in rem*, in which the court assumes control of the land, and which has as its primary purpose the settlement of such titles as to all the world. In substance—and the constitutional requirement of due process deals with substance rather than form—the action does not differ in character from the action to determine heirship (Code Civ. Proc., sec. 1664), which has always been regarded as a proceeding *in rem* (see *In re Blythe*, 110 Cal. 231, 234, [42 Pac. 643]), and sufficient to bar the rights of all persons claiming as heirs of the decedent, whether or not they are named in the complaint or personally served with summons. It may be conceded, however, that apart from an expression of Chief Justice Holmes in *Tyler v. Judges*, 175 Mass. 71, [55 N. E. 433], there is no authority directly supporting the proposition that a proceeding of the kind created by this act is strictly *in rem*. And we need not enter into a further discussion of the point, since we do not consider it necessary in this case to determine whether or not the action is one strictly *in rem*.

In any view the proceeding contemplated by the act is *quasi in rem*,—that is to say, the purpose of the proceeding is not to establish an “infinite personal liability” against any defendant, but is merely to affect the interest of the defendant in specific real property within the state which has at the outset of the proceeding been brought within the control of the court. It is thoroughly well established that the constitutional requirement of due process is as to such actions satisfied by a substituted service of summons, at least as to known and designated defendants who cannot be found within the state. The most frequently cited authority upon the question of the power of a state to affect the interests of non-residents by judgments rendered upon a substituted service of summons is *Pennoyer v. Neff*, 95 U. S. 714. In that case the court, speaking through Mr. Justice Field, said, regarding the question of jurisdiction in cases of service by publication: “Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. . . . It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants, but, in a larger and more general sense, the term is applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem* in the broad sense which we have mentioned.” Following the rules declared in *Pennoyer v. Neff*, it has universally been held that even in a purely personal action, where property within the state has been attached at the outset of a proceeding, the court may by publication of summons obtain jurisdiction to the extent of subjecting the attached property to the payment of the claim in suit.

The present proceeding has some of the characteristics of a suit to quiet title, a form of action well established as a branch of equity jurisdiction. While in the exercise of its inherent equity jurisdiction a court of chancery acts only *in personam*, it is no doubt competent for the legislature, so far as the constitutional provision regarding due process of law is concerned, to confer upon courts of equity a jurisdiction which shall, as to property situate within that state, operate upon it in some way other than by merely directing the defendants to do or refrain from doing some act concerning the property. The state has power to enact statutes under which the interests of persons in property within the state shall be affected so far as that property alone is concerned, and the action to quiet title, although originally under the old chancery practice merely a personal action against the defendant, may by statute be so extended as to permit the court to bind the interest of the defendant in the property, even though such defendant may not have been personally served with process within the state. *Arndt v. Griggs*, 134 U. S. 316, [10 Sup. Ct. 557], was a case involving the validity of a judgment obtained against a non-resident on publication of summons under statutes of Nebraska similar to our own (Code Civ. Proc., sec. 738 et seq.), authorizing persons claiming title to real estate to bring actions against any person or persons claiming an adverse estate or interest therein for the purpose of determining such estate or interest and quieting the title to said real estate. The court said: "But it is earnestly contended that no decree in such a case rendered on service by publication only is valid or can be recognized in the federal courts. . . . The propositions are, that an action to quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone. While these propositions are doubtless correct as statements of the general rule respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute might do, but it is, What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by a statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate? If a state has no

power to bring a non-resident into its courts for any purposes by publication, it is impotent to protect the titles to real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident would remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it.” And in *Perkins v. Wakeham*, 86 Cal. 580, [21 Am. St. Rep. 67, 25 Pac. 51], this court, in applying the same rule to a similar case, said: “Unless the method of giving notice above prescribed (i. e. by publication under section 412 of the Code of Civil Procedure) is unreasonable or in conflict with some provision of the constitution or principle of natural justice, it cannot be held invalid. In determining the question of its validity, the nature of the action and the effect of the judgment must be considered. While it is true, as a general proposition, that an action to quiet title is an action in equity which acts upon the person, it is also true that the state has power to regulate the tenure of immovable property within its limits, the conditions of its ownership, and the modes of establishing the same, whether the owner be citizen or stranger. While a decree quieting title is not *in rem*, strictly speaking, it fixes and settles the title to real estate, and to that extent certainly partakes of the nature of a judgment *in rem*.” There may be some expressions in the opinion in *Hart v. Sansom*, 110 U. S. 151, [3 Sup. Ct. 586], which, on their face, conflict with the rule as declared in the two cases just cited. In *Arndt v. Griggs*, however, the court carefully explained the *Sansom* case, and

pointed out that that case had to do with the effect of a judgment obtained on publication of summons in a purely personal action. Similarly in *Lynch v. Murphy*, 161 U. S. 247, 251, [16 Sup. Ct. 523], it was said: "The Hart case was explained in *Arndt v. Griggs*, 134 U. S. 316, [10 Sup. Ct. 557], in which last case it was held that the duty of determining unsettled questions respecting the title to real estate was local in its nature, to be discharged in such mode as might be provided by the state in which the land was situated, where such mode did not conflict with some special inhibition of the constitution and was not against natural justice; and we held that nothing inconsistent with this doctrine was decided in *Hart v. Sansom*." (See, also, *Roller v. Holly*, 176 U. S. 398, [20 Sup. Ct. 410]; *Bennett v. Fenton*, 41 Fed. 283; *Venable v. Dutch*, 37 Kan. 515, [1 Am. St. Rep. 260, 15 Pac. 520]; *Dillon v. Heller*, 39 Kan. 599, [18 Pac. 693]; *McLaughlin v. McCrory*, 55 Ark. 442, [29 Am. St. Rep. 56, 18 S. W. 762]; *Harris v. Palmore*, 74 Ga. 273; *Lane v. Innes*, 43 Minn. 137, [45 N. W. 4]; *Shepherd v. Ware*, 46 Minn. 174, [24 Am. St. Rep. 212, 48 N. W. 973]; *Lantry v. Parker*, 37 Neb. 353, [55 N. W. 962]; *Sloane v. Martin*, 145 N. Y. 524, [45 Am. St. Rep. 630, 40 N. E. 217]; *Roller v. Holly*, 13 Tex. Civ. App. 636, [35 S. W. 1074].)

So far, then, as the procedure authorized by the act under discussion affects the rights of persons known and designated in the proceedings who could not, on account of non-residence or for other sufficient reason, be personally served with summons within the state, it cannot, in view of these adjudications, be said that the service by posting, publication, and mailing fell short of that due process of law which is applicable to this sort of proceeding. The objection that under the act no persons need be named as defendants in the title of the action does not appear to us to have any bearing upon the question of due process of law, so far as known claimants are concerned. The constitutional guaranty of due process requires that in actions of this character persons whose interest in the land may be affected must be given such notice of the pendency of the proceeding and of the fact that their interests may be affected as is reasonable and appropriate to the nature of the case. If it be once conceded, as it must be, that such notice may, as to known claimants who cannot be personally served, be given by publication, we think it unimportant that the

person to whom such notice is given is not named in the caption of the complaint or the summons. The law requires him to be named in the affidavits and in the memoranda attached to the summons. If any notice whatever reaches such person, it will be, whether through the posting upon the premises, or the publication, or the service by mail, a notice which contains his name and advises him that his interest in the described property is involved in the proceeding, and that in order to defend such interest he must appear and plead within a given time. We see no reason why, so far as such designated claimants are concerned, the notice prescribed by the act does not satisfy every requisite of due process of law.

The principal contention upon this question of due process is that the act is unconstitutional in that it seeks to bar by the decree the rights of unknown owners, that is, those who are not alleged in the complaint or the affidavit to claim any interest in the property and who cannot have any notice of the fact that their rights are involved other than the general notice given by the posting and the publication.

If by a substituted service of any sort a court may be given power to adjudicate the rights of unknown claimants in a proceeding of this character, it seems plain that the notice to such claimants here provided is sufficient. All substituted service must rest upon the ground of necessity, and, where it is permissible at all, it must be such as would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested. Where, as here, the summons describing the nature of the action, the property involved, the name of the plaintiff and the relief sought, is posted upon the property, and is published in a newspaper for two months, and a *lis pendens* containing the same particulars is recorded in the recorder's office and entered upon the recorder's map of the property, we cannot doubt that, so far as concerns the possible claimants who are not known to the plaintiff, the notice prescribed by the act is as complete and full as, from the nature of the case, could reasonably be expected.

Indeed, the learned counsel for respondent, while they make some criticism upon details of the act regarding the notice, take their stand upon a broader proposition, and contend that in a proceeding which is not strictly *in rem* it is not within the

power of the legislature to authorize on any form of process a decree which shall by its own force cut off the rights of persons not named or made parties to the proceeding. It is claimed that under the constitutions in force in American jurisdictions, the rights of unnamed persons who may claim an interest in real estate cannot be cut off by any judicial proceeding except by one which makes the adjudication against them final only upon their failure to come in and assert their rights within a specified time after the judgment or decree. In such proceeding the decree does not operate *ex proprio vigore*, but becomes the starting point of a statutory period of limitation and the right is extinguished by failure to assert it within this period. In a way, the procedure thus outlined is analogous to the common-law fine, but because such method of accomplishing the result may have been the only one known to the common law, it does not follow that other methods may not be devised by the legislature without exceeding the limits of due process of law. No doubt the forms of procedure in common use at the time the constitutions were adopted must be taken to have been understood by the framers as embraced within the terms "due process of law." But in prohibiting the taking of life, liberty, or property without due process of law, those who adopted these constitutions did not intend to provide that the details of practice and procedure then existing should forever remain unchanged. The legislature may provide entirely novel and unprecedented methods of procedure, provided that they afford the parties affected the substantial securities against arbitrary and unjust spoliation which are embraced within the system of jurisprudence prevailing throughout the land. "It follows," says the Supreme Court of the United States in *Hurtado v. California*, 110 U. S. 516, [4 Sup. Ct. 111], "that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." It is not, therefore, a sufficient objection to the action created by this statute to say that no precisely similar proceeding was known to the common law.

Applying the principles which have led the courts in cases like *Arndt v. Griggs*, 134 U. S. 316, [10 Sup. Ct. 557], and

Perkins v. Wakeham, 86 Cal. 580, [21 Am. St. Rep. 67, 25 Pac. 51], to sustain judgments quieting titles against non-residents upon substituted service, why should not the legislature have power to give similar effect to such judgments against unknown claimants where the notice is reasonably full and complete? The validity of such judgments against known residents is based upon the ground that the state has power to provide for the determination of titles to real estate within its borders and that as against non-resident defendants or others who cannot be served in the state, a substituted service is permissible, as being the only service possible. These grounds apply with equal force to unknown claimants. The power of the state as to titles should not be limited to settling them as against persons named. In order to exercise this power to its fullest extent it is necessary that it should be made to operate on all interests, known and unknown. As was said by Holmes, C. J., in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, [55 N. E. 812], in speaking of a statute which in the particular under discussion was similar to ours: "If it does not satisfy the constitution, a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claimants,—indeed, certainty against the unknown may be said to be its chief end,—and unknown claimants cannot be dealt with by personal service upon the claimant."

Proceedings not strictly *in rem*, but intended to have the effect of barring unknown claimants who are brought in only by publication, or other substituted service, are not entirely new in our legislation. Leaving out of consideration proceedings for the probate of wills, for distribution of estates, escheats, and tax cases and the special proceedings to determine heirship provided by section 1664 of the Code of Civil Procedure, all of which are claimed by respondent to be distinguishable from the case at bar in that, as claimed, they are proceedings strictly *in rem*, we find in our statutes, in sections 749 to 751 of the Code of Civil Procedure, enacted in 1901, a statutory action to determine adverse claims to and clouds upon title to real property as against known defendants, and "also all other persons unknown, claiming any right, title, estate, lien or interest in the real property de-

scribed in the complaint adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto." It is true that the constitutionality of these sections has not yet been passed upon by this court. But that the state may confer upon its courts jurisdiction to declare title to real property within the state to be vested in the plaintiff as against other claimants, known or unknown, upon substituted service, has been held by the courts of several states in well-considered cases. In *Shepherd v. Ware*, 46 Minn. 174, [24 Am. St. Rep. 212, 48 N. W. 773], the court upheld a statute authorizing an action to quiet title and determine adverse claims, and providing for including as defendants, in addition to persons appearing of record or known to have a claim to the lands in controversy, "also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein." Service was authorized to be made upon such unknown defendants by publication. A judgment obtained pursuant to the statute was held to bind persons not named in the complaint or personally served, the court saying: "The legislature may, in its discretion, provide for substituted service in case of necessity, or where personal notice is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction of the court; and with a reasonable exercise of such legislative discretion the courts will not assume to interfere." This case was followed in *McClymond v. Noble*, 84 Minn. 329, [87 Am. St. Rep. 354, 87 N. W. 838]. In *State v. Westfall*, 85 Minn. 437, [89 Am. St. Rep. 571, 89 N. W. 175], the court said: "It is now the settled doctrine of this court that the district courts of this state are clothed with full power to inquire into and conclusively adjudicate the state of the title of all land within their respective jurisdictions, after actual notice to all the known claimants within the jurisdiction of the court, and constructive notice by publication of the summons to all other persons or parties, whether known or unknown, having or appearing to have some interest or claim thereto. The proceeding provided for by the act in question is such an one. It is substantially one *in rem*, the subject-matter of which is the state of the title of land within the jurisdiction of the court, and the provisions of the act for serving the summons and giving notice of the pendency of the proceedings are full

and complete, and satisfy both the state and federal constitutions. To hold otherwise would be to hold that the courts of this state cannot in any manner acquire jurisdiction to clear and quiet title to real estate by a decree binding all interests and all persons or parties, known or unknown." *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, [55 N. E. 812], was a proceeding brought to test the constitutionality of an act of the legislature of Massachusetts providing a method of land registration based upon the "Torrens system" so called. It was provided in the act that the decree for registration "shall bind the land and quiet title thereto," and "shall be conclusive upon and against all persons" whether named in the proceedings or not. The court held that the act did not violate the constitutional provisions as to due process of law. Chief Justice Holmes, who delivered the opinion of the court, expressed the view that the proceeding was one *in rem* in the most limited sense of the term. The majority of the court did not concur in this view, but did agree that whether or not the proceeding was strictly *in rem*, the requirement of due process was satisfied by giving to parties known, or who by reasonable effort could be known, notice by personal service or its equivalent, and to parties unknown notice by publication.

People v. Simon, 176 Ill. 165, [68 Am. St. Rep. 175, 52 N. E. 910], involved the validity of the act of 1897, establishing the "Torrens system" in Illinois. The law was upheld, and while the language of the opinion is not, perhaps, entirely clear, a careful reading of what was said on the point under discussion leads us to the conclusion that the court intended to hold, and did hold, that there was no violation of the constitution in the provisions of the act, coupled with those of the general law of Illinois, authorizing service by publication as against unknown owners and non-residents.

It is not to be denied that authority, and that of a high character, is cited in opposition to the views just expressed. The opinion of Justice Loring, dissenting, in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, [55 N. E. 812], and that of Vice-Chancellor Stevens in *Hill v. Henry*, 66 N. J. Eq. 150, [57 Atl. 554], both relied on by respondent, are careful and elaborate expositions of the law. They rest their conclusion, however, upon the proposition that the proceeding in

question is not strictly *in rem*. For the reasons heretofore stated, we do not regard this ground, if it be well taken, as determinative of the question involved. In *State v. Guilbert*, 56 Ohio St. 575, [60 Am. St. Rep. 756, 47 N. E. 551], the court declared the Ohio "Torrens Law" to be unconstitutional. While there is in the opinion some language which lends apparent support to the contentions of respondent, the fact is that the law there involved did not require personal service of summons or notice even upon resident claimants, whose existence, names, and places of abode were all known to the plaintiff or petitioner. The same defect attached to the statutes which were declared null in *Brown v. Board*, 50 Miss. 471, and *Webster v. Reid*, 11 How. (U. S.) 437. That, as to such defendants, a service by publication is not sufficient to constitute due process of law in a proceeding not strictly *in rem* must be admitted. And in this connection it may be well to notice the contention of respondents, that by the terms of the act now under consideration the plaintiff in the proposed action may include among "unknown claimants" those who, with reasonable diligence on his part, might have become known to him. It is no doubt true that, so far as substituted service upon a class of unknown claimants is permitted at all, in proceedings which are merely quasi *in rem*, it rests upon the ground of necessity, and that this necessity will not justify the omission of personal service upon all who could with reasonable diligence be ascertained and found. This principle is recognized even in the cases which sustain the power to bind "unknown owners" by substituted service in actions of the character now under consideration. (*Tyler v. Judges of the Court of Registration*, 175 Mass. 71, [55 N. E. 812]; *Shepherd v. Ware*, 46 Minn. 174, [24 Am. St. Rep. 212, 48 N. W. 773].) But we think that, on a proper construction, the act under examination does require the plaintiff to designate and to serve as known claimants all whom with reasonable diligence he could ascertain to be claimants. It is not clear, as claimed by petitioner, that section 5 of the act requires in the affidavit a statement of the examination and inquiry made by plaintiff to enable him to aver that "he does not know and has never been informed of" any person claiming adversely. But apart from the affidavit the evident purpose of the act is to secure, so far as possible, actual notice of the proceeding to all known

claimants—by personal service if they reside and can be found within the state, by mailing if they cannot be so found or are non-residents. We have no doubt that where the statute is thus careful to secure actual notice to known claimants, it should not be construed as intended to permit a plaintiff to willfully or negligently close his eyes to the means of knowledge and thus secure a decree by publication and posting alone, as against persons whose identity he might have learned by the use of due effort. For the purposes of this statute the adverse claimants whom plaintiff “knows or of whom he has been informed” include all as to whom he would, by reasonable inquiry, have had knowledge or information. It is unnecessary to multiply authorities in support of the well-settled rule that “the means of knowledge is equivalent to knowledge.” (Civ. Code, sec. 19; *Wood v. Carpenter*, 101 U. S. 135; *Shain v. Sresovich*, 104 Cal. 402, [38 Pac. 51].) The rule applies wherever the circumstances impose upon the party the duty of inquiry (*Bank of Mendocino v. Baker*, 82 Cal. 114, [22 Pac. 1037]; *Prouty v. Devin*, 118 Cal. 258, [50 Pac. 380]), and we are satisfied that the statute in question imposes upon the party seeking to proceed under it the duty of inquiry as to the names and residences of all persons who may claim an adverse interest in the property. (*Leigh v. Green*, 64 Neb. 533, [101 Am. St. Rep. 592, 90 N. W. 255]; *Mulvey v. Gibbons*, 87 Ill. 367; citing further *Farnham v. Thomas*, 56 Vt. 33.) So construed the statute does not, nor can an action prosecuted under it, deprive any person of his property without due process of law.

2. It is strongly urged for the respondent that the “action” contemplated by the statute is not a judicial but an administrative proceeding. The disposition of such proceeding being by the act conferred upon the superior court, it is claimed that there is a violation of the provision of the state constitution (art. III, sec. 1), dividing the powers of government into three departments,—the legislative, executive, and judicial,—and prohibiting the exercise by any one of these departments of functions appertaining to either of the others. It is also claimed as another result from the same premise that to divest property rights by a proceeding which is not judicial is not “due process of law.”

To maintain the position that the proceeding is not judicial, the argument is advanced that the jurisdiction of the court is (at least in cases where there is no "known" adverse claimant) invoked upon a mere allegation of the petitioner's right or title, without any assertion that such right is assailed or disputed by any one, and that in such cases the decree rendered is a mere declaration of right, made substantially upon an *ex parte* application. It is not to be disputed that, as a general proposition, the judicial function is the determination of controversies between parties, and that the courts will not concern themselves with settling abstract questions of law which may never be involved in an actual dispute regarding property or other rights. Quotations to this effect may be found in a multitude of cases, many of which are cited in the briefs. But it is not to be understood that it is never the exercise of a judicial function for a court to act upon the application of a party who seeks some form of relief, even though at the outset of the proceeding no person is named or designated as opposing the granting of such relief. "It is certainly clear as a general rule," says Selden, J., in *Cooper's Case*, 22 N. Y. 84, "that whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature." In the present case there is a provision for notice to all persons interested in opposing the plaintiff's application, and an opportunity to them to come in and oppose it. There are in our law many instances of proceedings which are analogous to the one under discussion, and they have uniformly been regarded as judicial. Thus, we do not question that the superior court exercises judicial functions in granting letters of administration, or admitting a will to probate, or ordering the sale of property of decedents, or distributing estates of decedents, or determining and declaring heirship, notwithstanding the suggestion made in one of the briefs that probate proceedings are "administrative." At any rate, it cannot be denied that such proceedings are judicial, where in response to the published or posted notice some person interested appears to contest the application, although at the outset the petition does not in any of the instances cited disclose a "controversy" or an "invasion of the petitioner's right" in any sense in which such elements

are not present in the action brought under the statute now being considered. A petition for change of name (Code Civ. Proc., secs. 1275-1279) discloses neither controversy nor an actual or threatened denial by any one of petitioner's right, yet such proceeding is judicial. (*In re Societe Francaise*, 123 Cal. 525, [56 Pac. 458].)

Indeed, so far as this court is concerned the question would seem to be foreclosed by the repeated decisions holding the proceeding for the confirmation of the organization of irrigation districts (Stats. 1889, p. 12) to be judicial, and properly committed to the superior court for determination. (*Cullen v. Glendora Water Co.*, 113 Cal. 503, [39 Pac. 769, 45 Pac. 822, 1047]; *People v. Linda Vista Irrigation District*, 128 Cal. 477, [61 Pac. 86]; *People v. Perris Irrigation District*, 132 Cal. 289, [64 Pac. 399, 773]; *People v. Perris Irrigation District*, 142 Cal. 601, [76 Pac. 381].) In *People v. Linda Vista Irrigation District*, 128 Cal. 477, [61 Pac. 86], this court adhered to its earlier views regarding the construction and effect of the confirmatory statute of 1889, notwithstanding the suggestion of Brewer, J., in *Tregea v. Modesto Irrigation District*, 164 U. S. 179, [17 Sup. Ct. 52], to the effect that the proceeding for confirmation presented a mere moot case, not calling for judicial consideration. But even the acceptance of the views of Justice Brewer would not require us to hold that the proceeding here involved is not judicial. The action or special proceeding now in question is devised, as has been stated, for the purpose of establishing a title which is in fact good, but which is not deducible of record. That a court of equity may remedy such defect by a decree, although there is no actual controversy as to the title, was held in *Sharon v. Tucker*, 144 U. S. 533, [12 Sup. Ct. 720], the court saying: "The title of the complainants is not controverted by the defendants, nor is it assailed by any action for the possession of the property, and this is not a suit to put an end to any litigation of the kind. It is a suit to establish the title of the complainants as matter of record, that is, by a judicial determination of its validity, and to enjoin the assertion by the defendants of a title to the same property from the former owners, which has been lost by the adverse possession of the parties through whom the complainants claim." (See, also, *Blight v. Banks*, 6 Mon. T. B. 192, [17 Am. Dec. 136].)

And this court has held, that in an action to quiet title under sections 738 and 739 of the Code of Civil Procedure the absence of a finding that the defendants asserted a claim adverse to the plaintiff is immaterial. (*Bulwer Cons. Min. Co. v. Standard Cons. Min. Co.*, 83 Cal. 589, [23 Pac. 1102].) "Even though the defendant makes no adverse claim," says the court, "third persons may regard plaintiff's title as being subject to an adverse claim by the defendant, which would be a cloud upon plaintiff's title, depreciating its value, and which he would be entitled to have removed by the decree of the court." The action here involved may well, as claimed by petitioner, be regarded as a suit to remove a cloud upon titles, the legislature having power to declare what shall form such cloud (*Clark v. Smith*, 13 Pet. 195), and having in effect declared by this statute that the destruction of public records constitutes a cloud upon title.

Again, it will be observed that in other states statutes providing for the determination of titles, under the Torrens system by administrative officers have been assailed and declared void upon the ground that the power of determining such titles was essentially judicial and to be exercised only by the courts. (*People v. Chase*, 165 Ill. 527, [46 N. E. 454]; *State v. Guilbert*, 56 Ohio St. 575, [60 Am. St. Rep. 756, 47 N. E. 551].) The same view as to the nature of such functions was taken in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, [55 N. E. 812]; *People v. Simon*, 176 Ill. 165, [68 Am. St. Rep. 175, 52 N. E. 910]; *State v. Westfall*, 65 Minn. 437, [89 Am. St. Rep. 571, 89 N. W. 175].

The argument, advanced with much force and ability, that even a judicial proceeding cannot divest property rights, in the absence of an allegation of a controversy between parties to the record, may be viewed as a restatement, in another form, of the objections to statutes authorizing judgments against "unknown owners." This contention, if adopted, would require us to hold that, except in proceedings strictly *in rem*, no statute can constitutionally authorize valid judgments as against persons not ascertained or made parties defendant by name or other specific description. For the reasons before given we cannot accept this conclusion.

3. Finally, it is said that the statute violates the provision of the state constitution prohibiting the legislature from pass-

or propriety of certain legislation restricted to that class, such legislation, if applicable to all members of that class, is not violative of our constitutional provisions against special legislation."

Under these rules we think the proceeding created by the act in question is sufficiently distinct and different from ordinary civil actions covered by the general rules of the code to justify the creation of a class which shall be characterized by the special rules of procedure here provided. As we have said, this act is intended to remedy an evil arising from an unusual circumstance, to wit, the destruction of the public records and the consequent inability to deduce a safe or merchantable title to real estate. Such inability furnishes a good reason for the creation of a procedure which shall enable owners of real estate to establish their titles, not only as against known adverse claimants, but as against even unknown and undetermined persons who may claim adversely. Many of the differences above referred to are rendered necessary by the fact that this proceeding seeks to bind such unknown claimants. Thus, since claimants can be brought in only by publication of summons, it would be useless to require the plaintiff to furnish to the court an affidavit upon which the court may determine whether or not summons shall be published. If it is to be published in every case, why should there be proof of special facts authorizing a publication? Again, the fact that the court or judge cannot know who may be affected by the proceeding seems to furnish a reason for not requiring the designation of any particular newspaper as "most likely to give notice to the person to be served." The provision that the summons should be mailed to non-resident defendants within fifteen days, instead of forthwith, as required in ordinary actions, finds a reasonable justification in the fact that the summons so mailed must have attached to it a memorandum showing the date of the first publication. As the first publication may be some days after the order for publication, it might be impossible to attach this memorandum to the copy of the summons to be mailed, if such mailing were to take place forthwith.

The objections which are urged to the provisions of the statute authorizing a special form of complaint and summons may, we think, all be answered by saying that the proceeding

in question differs so materially from most actions as to justify such peculiarities in procedure. The primary purpose of the proceeding is to determine the *status* of the title to specific property. While the rights of individuals are necessarily involved and adjudicated, this primary purpose is sufficient to justify a form of pleading and process which shall direct attention to the land to be affected rather than to the persons who may be interested in it.

Our codes are full of provisions making special rules applicable to different classes of cases, and it has never been supposed that such provisions are invalid merely because the procedure in each case is not in every particular exactly the same as for every other case. Thus, in actions for unlawful detainer the summons is returnable not less than three nor more than twelve days from its date (Code Civ. Proc., sec. 1166), thereby reducing the defendant's time to appear or answer below the ten days allowed in ordinary actions. The chapter providing for actions against steamers, vessels, and boats contains special provisions for the contents of the complaint (Code Civ. Proc., sec. 815), and for the service of summons (Code Civ. Proc., sec. 816). The summons in proceedings in eminent domain differs in various particulars from the form of summons in civil actions (Code Civ. Proc., sec. 1245). In proceedings relative to escheated estates the order requiring persons interested to appear and show cause why the estate should not vest in the state is published for one month, and parties interested have forty days from the date of the order to appear instead of having thirty days after a publication for at least two months, as in other cases of publication of summons. All of these differences may be upheld upon the ground that the proceeding in question is of such a peculiar nature as to justify its classification for purposes of procedure. Without considering in detail every point in which this act is said to differ from the code defining the general procedure in civil actions, we are satisfied that here, as in the Deyoe case, the nature of the proceeding is such as to justify the legislature in creating for it the special procedure prescribed by the statute. After all, the question of classification is primarily for the legislature. The court is not to set aside a statute merely because in its view it may have been unwise or unnecessary to apply certain rules to one

class of cases. Before the act can be declared invalid on this ground, it must appear to the court that there was no reasonable basis on which the peculiar legislative provision could have been made. We are not prepared to say that the needs which called this legislation into being, and the purposes sought to be accomplished, were not so peculiar in their character as to permit the legislature to devise this remedy and these methods of seeking it.

It is not necessary to decide at this time whether parties not personally served may come in and defend within one year after judgment, as provided in section 473 of the Code of Civil Procedure. Whether that section applies to proceedings under this act is a question of construction, which can best be considered when it arises in a case directly involving the point. We doubt that the interpretation excluding the right to come in would invalidate the act. If it should be considered to have such effect, that would be sufficient ground for construing the act so as to allow the application of section 473 of the Code of Civil Procedure,—a construction that is certainly possible under section 12 of the statute.

The objection is made that the act is special because it applies only where the records have been destroyed by earthquake, fire, or flood. Possibly public records might be destroyed by other causes, but certainly the three agencies of destruction named are those which are most likely to occur in this state, and are the only ones which, so far as we know, have in our past history caused any considerable destruction of public records. These facts furnish ample ground for limiting the operation of the act to the cases to which it has been made applicable.

The title of the act is sufficient to comply with article IV, section 24 of the constitution. (*Ex parte Liddell*, 93 Cal. 633, [29 Pac. 251]; *Deyoe v. Superior Court*, 140 Cal. 476, [98 Am. St. Rep. 73, 74 Pac. 28].)

A peremptory writ of mandate will issue as prayed.

Angellotti, J., Henshaw, J., Shaw, J., McFarland, J., Lorigan, J., and Beatty, C. J., concurred.

Rehearing denied.

[L. A. No. 1629. Department One.—January 19, 1907.]

ANAHEIM UNION WATER COMPANY, and SANTA ANA VALLEY IRRIGATION COMPANY, Respondents, v. O. B. FULLER, G. H. FULLER, FRED ZUCKER, and F. J. SMITH, Appellants.

RIPIARIAN RIGHTS—BOTTOM LANDS ON EACH SIDE OF RIVER.—The owners of wide bottom lands, through which a river flows, lying between high lands or bluffs on each side, have riparian rights therein.

ID.—LAND BEYOND WATERSHED.—Land which is not within the watershed of the river is not riparian thereto, and is not entitled, as riparian land, to the use or benefit of the water from the river, although it may be part of an entire tract which does extend to the river.

ID.—UNION OF STREAMS—LANDS ABOVE JUNCTION.—Where two streams unite, each, in regard to riparian rights, is to be considered a separate stream respecting lands abutting thereon above the junction, and land lying within the watershed of one stream above that point is not to be considered as riparian to the other stream. The facts that the streams are of different sizes and that both of them lie in one general watershed or drainage basin, and that they are separated by the summit or crown of a comparatively low tableland, do not change this rule.

ID.—LOSS OF RIPIARIAN RIGHTS—CONVEYANCE OF NON-ABUTTING LAND.—If the owner of a tract of land abutting on a stream conveys to another a non-contiguous part of the tract, he thereby cuts off the part conveyed from all participation in the use of the stream and from riparian rights therein, unless the conveyance declares the contrary. Land thus severed from the stream can never regain the riparian right, though subsequently reconveyed to an abutting owner.

ID.—CONTIGUITY OF NON-ABUTTING LAND TO UNDERGROUND FLOW.—The contiguity of land which does not abut on the surface stream of the river to the underground flow or percolation of the stream does not carry with it the right of the owner to divert water from the surface stream and transport it to his land across intervening land, to the injury of lands which abut on the proper banks of the surface stream, even though such non-abutting land is within the watershed.

ID.—INJUNCTION AGAINST IMPROPER DIVERSION OF STREAM—ACTUAL DAMAGE IMMATERIAL.—A lower riparian proprietor may enjoin an improper diversion of the stream above him by non-riparian owners, which operates as a legal injury to his rights, without being required to make any showing of present actual damage. It is sufficient to support the injunction that the unlawful diversion may by lapse of time grow into an adverse right.

APPEAL from a judgment of the Superior Court of Riverside County and from an order denying a new trial. Benjamin F. Bledsoe, Judge presiding.

The facts are stated in the opinion of the court.

E. W. Freeman, for Appellants.

E. E. Keech, Richard Melrose, John D. Pope, and A. W. Hutton, for Respondents.

SHAW, J.—This is an action to enjoin the defendants from diverting water from the Santa Ana River. Judgment in favor of the plaintiffs, as prayed for, was given in the court below. The defendants appeal from the judgment and from an order denying their motion for a new trial.

The plaintiffs own lands through which the Santa Ana River flows. They have been accustomed for many years to irrigate this land with waters from the river, and for that purpose there is required during the irrigating season a continuous flow of four hundred miner's inches of water. The defendants, or some of them, own land on the river, situated above the land of the plaintiffs, and upon it they had built a dam in the river and were thereby diverting water from the stream, which, by means of a ditch, they were conducting to other lands owned by them and were there using it for irrigation. The plaintiffs claim, and the court found, that the land which the defendants were thus irrigating with water from the river was not riparian thereto. The sufficiency of the evidence to support this finding, and the question whether or not the plaintiffs' land is entitled to riparian rights in the river, are the principal questions presented upon the appeals.

1. The defendants claim that the land of the plaintiffs lies within, and constitutes a part of, the bed of the stream, and contend that such land is not riparian, nor, as such, entitled to the use of the water of the stream. It appears that the land consists of good soil, capable of producing valuable crops; that it abuts on the river, and that it has been successfully cultivated and irrigated by the plaintiffs and their predecessors for many years. The only facts upon which the claim that it is non-riparian is based are that it forms part of the wide bottom extending between higher lands

or bluffs on each side; that the course of the river channel is subject to changes by unusual floods, although no substantial change has occurred for forty years last past, and that the land is all underlaid by an underground flow in contact with and forming a part of the surface stream. We are of the opinion that land thus situated is not to be distinguished from other land abutting on the stream, so far as the right of the owner to the reasonable use of the water is concerned. We know of no principle of riparian rights that would except such land from its benefits, nor of any decision to that effect. The opinion in *Ventura L. and P. Co. v. Meiners*, 136 Cal. 284, [89 Am. St. Rep. 128, 68 Pac. 818], contains nothing that can be so construed. It appears to decide that land may be riparian to a stream, although it does not abut thereon except when the stream is swollen by floods. Without conceding the soundness of the decision so far as it seems to decide that the owner of such land may take water from the stream at its ordinary flow as against other owners whose lands abut upon such ordinary stream, we think it is clear that the discussion in the opinion as to the character of the ground lying between the edge of the stream at its ordinary flow and the line of high water when in flood, has no reference to the right of the owner of such intervening land, as a riparian owner, to use the water of the stream for any useful purpose which his position upon the stream enables him to make of it. The land here involved was not at all similar to the land described in the opinion in that case. The case of *Diedrich v. North Western Union Ry. Co.*, 42 Wis. 264, [24 Am. Rep. 399], is not in point. It refers to the rights of the owner of land lying wholly under the bed of a navigable lake, and holds that such owner may not erect wharves or other structures thereon which would interfere with navigation, and that in that respect he has not the right of one owning land along the bank of such lake to erect wharves in aid of navigation for his own use. There is nothing in that opinion to indicate that the owner of land which was under the bed of an ordinary stream might not, by virtue of the position of his land, have such benefit from the water as he could get from it. This question, however, is not involved in the case at bar, for we are of the opinion that the plaintiffs' land was not in the bed of the stream in any proper sense of the term.

2. Some distance below the land of the plaintiffs a tributary known as Chino Creek enters the Santa Ana River. Chino Creek also has a tributary known as Mill Creek, which enters Chino Creek one and one-half miles above the confluence of the latter with the Santa Ana River. The defendants take the water from the river, above the land of the plaintiffs, in a ditch which extends across the low bottom to the high land or bluff and then extends along the bluff at a grade less than that of the river, gradually getting further above and away from the river until it reaches and crosses the divide, or summit of the elevated land, between the river and Mill Creek. The court found that the land irrigated with water from this ditch lies beyond this divide and is wholly within the watershed of Mill Creek, and that it does not abut upon the stream of the Santa Ana and is not riparian thereto. Land which is not within the watershed of the river is not riparian thereto, and is not entitled, as riparian land, to the use or benefit of the water from the river, although it may be part of an entire tract which does extend to the river. (*Chauvet v. Hill*, 93 Cal. 410, [28 Pac. 1066]; *Bathgate v. Irvine*, 126 Cal. 135, [77 Am. St. Rep. 158, 58 Pac. 442]; *Southern Cal. I. Co. v. Wilshire*, 144 Cal. 68, [77 Pac. 767]; *Watkins L. Co. v. Clements*, 98 Tex. 578, [107 Am. St. Rep. 653, 86 S. W. 733].)

The defendants claim that these findings are contrary to the evidence and that this rule does not apply to the land they seek to irrigate, because, while it is wholly within the Mill Creek watershed, it is also within the general watershed of the Santa Ana River, considered as an entirety including the valley and the slopes leading thereto from its sources to its mouth. This fact does not affect the case, at least so far as the land of the plaintiffs is concerned. The principal reasons for the rule confining riparian rights to that part of lands bordering on the stream which are within the watershed are, that where the water is used on such land it will, after such use, return to the stream, so far as it is not consumed, and that, as the rainfall on such land feeds the stream, the land is, in consequence, entitled, so to speak, to the use of its waters. Where two streams unite, we think the correct rule to be applied, in regard to the riparian rights therein, is that each is to be considered as a

separate stream, with regard to lands abutting thereon above the junction, and that land lying within the watershed of one stream above that point is not to be considered as riparian to the other stream. The fact that the streams are of different size, or that both lie in one general watershed or drainage basin should not affect the rule, nor should it be changed by the additional fact that the two watersheds are separated merely by the summit or crown of a comparatively low tableland, or *mesa*, as it is called in the evidence, and not by a sharp or well-defined ridge, range of hills, or mountains. The reasons for the rule are the same in either case. In some cases it may be difficult to distinguish the line of separation. This seems to have been a case of that sort. Nevertheless, we think there is evidence sufficient to support the finding of the court that there is a dividing line between the two watersheds and that the land irrigated by defendants lies upon the slope which descends into Mill Creek. It is not necessary to discuss this evidence in detail.

The evidence also supports the finding that the land irrigated by the defendants does not abut upon or extend to the river. If the owner of a tract abutting on a stream conveys to another a part of the land not contiguous to the stream, he thereby cuts off the part so conveyed from all participation in the use of the stream and from riparian rights therein, unless the conveyance declares the contrary. Land thus conveyed and severed from the stream can never regain the riparian right, although it may thereafter be reconveyed to the person who owns the part abutting on the stream, so that the two tracts are again held in one ownership. (*Boehmer v. Big Rock C. I. Dist.*, 117 Cal. 26, [48 Pac. 908]; *Alta Land Co. v. Hancock*, 85 Cal. 229, [20 Am. St. Rep. 217, 24 Pac. 645]; *Lux v. Haggin*, 69 Cal. 424, [10 Pac. 674]; *Watkins L. Co. v. Clements*, 98 Tex. 578, [107 Am. St. Rep. 653, 86 S. W. 738, 835]; 2 Farnham on Waters, 1572, sec. 463a.) All the land belonging to the defendants, including the Smith tract, which was in part irrigated, was originally a part of the Jurupa Rancho, which abutted upon the river. The original owner of that rancho subdivided it by arbitrary lines, corresponding to the government surveys, and sold and conveyed it in parcels according to that survey. Under the rule above stated, the conveyance by him of a tract not con-

tiguous to the stream would sever such tract from the riparian interest and deprive it of subsequent participation in the use of the water of the river, the right to which previously attached to the entire rancho. The tract which includes the irrigated land of the defendants is not at any point contiguous to the river. At the time the action was begun it was owned by the defendant, Smith. He was not the owner of any adjoining land which lay contiguous to the river. After the action was begun he conveyed this land to certain of the other defendants, some of whom owned adjoining lands extending from the Smith land to the river. This subsequent conveyance gave those defendants a continuous ownership of land extending from the river to and including the Smith land. This contiguous ownership, however, did not confer upon the Smith land the riparian rights of which it was deprived when Smith, or his predecessors, obtained it by a conveyance which severed it from the portion of the Jurupa Rancho abutting upon the river.

It seems to be contended that, for the purpose of determining what lands are riparian, the river is to be considered as including all the space through which its underground flow extends, as well as that occupied by the surface stream. It is claimed by the appellants, and apparently conceded by the respondents, that the Smith tract at one or two of its angles extends into the low bottom under which the underground water flows or percolates, and upon this circumstance riparian rights are asserted to accrue. It is not necessary here to decide what rights to the use of the underground flow of a stream may, by virtue of its position, attach to land which abuts upon or extends into or over such waters, but does not extend to the surface stream. We are certain that such location of the land, with relation to the stream, does not carry the right to divert water from the surface stream, conduct or transport it across intervening land to the tract thus separated from such surface stream, and there apply it to use on the latter to the injury of lands which abut upon the proper banks of the surface stream, and, hence, that even if the Smith land were all within the watershed, such location upon the underground flow does not justify the diversion the defendants were making from the surface stream for use upon that tract.

3. It is further contended that the plaintiffs' land is in no-wise damaged by the diversion complained of, and hence that the diversion cannot be enjoined. Upon this proposition the decisions of this court, and the general principles of law regarding injunctions, are against the theory of the defendants. In *Southern Cal. I. Co. v. Wilshire*, 144 Cal. 68, [77 Pac. 767], speaking of the right of a lower riparian proprietor to enjoin a diversion of a part of the stream for use outside of the watershed of the stream, leaving enough in the stream for any use which had theretofore been made, or was then proposed to be made, by the lower riparian proprietor on his land, the court said: "It is not necessary in such cases, for the plaintiff to show damages, in order that it may be entitled to a judgment. It is enough if it appears that the continuance of the acts of the defendants will deprive it of a right of property, a valuable part of its estate. The taking of the water beyond the watershed would, therefore, be an injury to the plaintiff's riparian right which, under the pleadings and findings in the case, the plaintiff was entitled to have enjoined," citing *Moore v. Clear L. W. Co.*, 68 Cal. 146, [8 Pac. 816]; *Stanford v. Felt*, 71 Cal. 249, [16 Pac. 900]; *Heilbron v. Fowler S. C. Co.*, 75 Cal. 426, [7 Am. St. Rep. 183, 17 Pac. 535]; *Conklin v. Pac. I. Co.*, 87 Cal. 296, [25 Pac. 399]; *Walker v. Emerson*, 89 Cal. 456, [26 Pac. 968]; *Spargur v. Heard*, 90 Cal. 221, [27 Pac. 198]. All of these authorities fully sustain the proposition to which they are cited. In *Stanford v. Felt*, 71 Cal. 249, [16 Pac. 900], the court says: "Nor is the owner lower down the stream required to show, in order to procure an injunction, any actual present damage. The diversion, by lapse of time, may grow into a right [citing authorities]. To prevent such result, an injunction will be awarded." The same proposition is reiterated in the other cases. The defendants, in opposition to the above decisions, cite the case of *Modoc L. and L. Co. v. Booth*, 102 Cal. 151, [36 Pac. 431], and *Vernon I. Co. v. Los Angeles*, 106 Cal. 243, 256, [39 Pac. 762]. In the Modoc case, however, it appeared that "during the months of June, July, August and September, when respondent used the small quantity of water appropriated by him, the full flow would have worked an injury rather than a benefit to appellants, and they sought to avoid the injury by maintaining expensive diverting and drain-

age works," to turn off the water and keep their lands from being overflowed. The decision was evidently based on the doctrine, stated in some of the decisions, that a diversion of water during times of extraordinary floods which does not perceptibly diminish the stream below will not be enjoined. (*Edgar v. Stevenson*, 70 Cal. 286, [11 Pac. 704]; *Heilbron v. 76 Land and Water Co.*, 80 Cal. 194, [22 Pac. 62]; *Fisfield v. Spring Valley W. W.*, 130 Cal. 552, [62 Pac. 1054]; Black's Pom. Water-Rights, sec. 75.) Unless it can be so reconciled, the case is contrary to all the other decisions of this court above cited and to the settled principles of law, and must be disregarded. In *Vernon I. Co. v. Los Angeles*, 106 Cal. 243, [39 Pac. 762], the plaintiff was not claiming any injury or damage by virtue of his riparian ownership, but was asserting the right to divert water for use upon lands not riparian, against the city of Los Angeles, which was asserting its pueblo right, and what was said in that case with respect to the necessity of showing injury must be taken with the qualifications made evident by the character of the case and by the concurring opinion of Mr. Justice McFarland. The conditions existing in those cases do not exist in the case at bar. The court finds, on sufficient evidence, that the diversion of the defendants, if allowed, would render plaintiffs' land much less fertile and valuable. The defendants do not propose to limit the diversion to times of high water, but, on the contrary, they will take it during the time of its greatest scarcity. There is no question of the diversion of flood water involved in the case. The right which they assert is the right to take the ordinary water of the stream, and hence the doctrine of the *Modoc* case does not apply.

On this point the defendants cite several cases in which it is held that a lower riparian owner cannot enjoin a diversion by another riparian proprietor above, unless he can show that such diversion works damage to him and that it is more than a just proportion of the water to which the upper owner is entitled. Such decisions are not applicable to this case. Riparian owners have correlative rights in the stream, and neither is a trespasser against the other until he diverts more than his share and injures and damages the other thereby. Here the defendants were not, with respect to the land irrigated, riparian owners, but were trespassers on plaintiffs'

property rights from the beginning, and the continuance of the trespass for a sufficient time would divest the right of the plaintiffs with respect to the water diverted. The same distinction exists with respect to cases cited involving the taking of percolating water for use by one owner upon his land, to the detriment of other land over the same saturated plane. The rights in such cases are correlative, and if an injunction can issue at all therein, it can be only when one owner takes more than his due proportion and damage to the other ensues from such excessive taking.

The defendants urge, inasmuch as the plaintiffs need but four hundred inches of water for their land, and there remained in the stream after defendants' diversion more than two thousand inches, which flows down to and beyond the plaintiffs' land, and which is more than they can possibly use thereon, that it therefore follows that no damage can ever ensue, even if the diversion is unlawful and should ripen into a prescriptive right by continuance, and, hence, that their diversion should not be enjoined. The theory of the law of riparian rights in this state is, that the water of a stream belongs by a sort of common right to the several riparian owners along the stream, each being entitled to sever his share for use on his riparian land. The fact that a large quantity of water flows down the stream by and beyond the plaintiffs' land does not prove that it goes to waste, nor that the plaintiffs are entitled to take a part of it, as against other riparian owners or users below. Nor can it be said that plaintiffs, on account of the present abundance, could safely permit defendants to acquire, as against them, a right to a part of the water. The riparian right is not lost by disuse, and other riparian owners above may take, or others below may be entitled to take, and may insist upon being allowed to take, all of the stream, excepting only sufficient for the plaintiffs' land. In either alternative, the taking of a part of the water by the defendants would not leave enough for the plaintiffs' use. There is nothing in this case to show how much water is required above and below by those having rights in the stream. In view of the well-known aridity of the climate and the high state of cultivation in the vicinity, the court could almost take judicial notice that in years of ordinary rainfall there is no surplus of water in the stream over that used by the

various owners under claim of right. But, however this may be, it is settled by the decisions above cited that a party, situated as the plaintiffs are, can enjoin an unlawful diversion, in order to protect and preserve his riparian right.

The findings support the judgment, and we are unable to perceive any substantial or material conflict in them. We find no error in the record.

The judgment and order are affirmed.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

[S. F. No. 4218. Department One.—January 19, 1907.]

**ELIZABETH D. JOHNSON, Respondent, v. GERMAN
AMERICAN INSURANCE COMPANY, Appellant.**

BILL OF EXCEPTIONS—FAILURE TO SERVE IN TIME—ABSENCE OF RELIEF—REVIEW UPON APPEAL.—Upon appeal from the judgment and from an order denying a new trial, where the record shows that the bill of exceptions used on the motion for a new trial was not prepared and served in time, and shows no relief from the default, the bill of exceptions cannot be considered on either appeal.

ID.—CONSTRUCTION OF CODE AS TO EXTENSION OF TIME—POWER OF JUDGE OF COUNTY—PROHIBITION.—Section 1054 of the Code of Civil Procedure allowing an extension of time by the judges of the superior court of the county must be construed subject to the express prohibition of section 170 of that code, that no disqualified judge shall act.

ID.—VOID ORDER EXTENDING TIME—DISQUALIFICATION OF JUDGE.—An order extending the time in which to prepare and serve the bill of exceptions to be used on the motion for a new trial, made by a judge who was disqualified to act, under section 170 of the Code of Civil Procedure, as the same existed prior to its amendment in 1905, was absolutely void, wherever brought in question, and could not operate to relieve from failure to serve the bill of exceptions within the time otherwise limited.

ID.—ABANDONMENT OF APPLICATION FOR RELIEF—ACQUIESCENCE IN RULING OF COURT.—Where a bill of exceptions settled on the hearing of a motion to dismiss the proceedings for a new trial shows that appellant made a conditional motion to be relieved from its failure

to serve its proposed statement in time, "if there was such failure," upon the ground of mistake, inadvertence, and excusable neglect, supported by an affidavit not contained in the record, and that the court never ruled upon such conditional motion, but denied the motion solely on the ground that there was no default, the appellant, by acquiescence in this action of the court, and omission to except to the failure to rule upon the motion for relief, and voluntarily submitting the motion for a new trial upon the record as it then existed, waived and abandoned the motion for relief under section 473 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of San Mateo County and from an order denying a new trial. Hiram D. Tuttle, Judge presiding.

The facts are stated in the opinion of the court.

Corbet & Goodwin, and E. F. Fitzpatrick, for Appellant.

Charles S. Peery, and Galpin & Bolton, for Respondent.

ANGELLOTTI, J.—This is an appeal from a judgment in favor of plaintiff and from an order denying a motion for a new trial in an action brought and tried in the superior court of San Mateo County upon a policy of insurance against loss by fire. The only matters discussed in appellant's brief are as to the insufficiency of the evidence to justify the verdict, and instructions given to the jury. It was attempted to present the questions so discussed by bill of exceptions settled for use on the motion for a new trial. It is claimed that appellant's proposed bill of exceptions on motion for a new trial was not served within the time provided by law, and, therefore, could not be considered on the motion for new trial, and cannot be considered on the appeal from the order denying such motion, or on the appeal from the judgment. This objection was never waived by plaintiff. Upon this ground plaintiff objected to the hearing of the motion for a new trial in the lower court, and moved to dismiss all proceedings thereunder, but the court refused to dismiss on this ground, heard the motion for a new trial, and denied it. If there was no bill of exceptions which could be considered on the motion for a new trial, the order denying the new trial must be affirmed, for otherwise no error is shown in the action of the lower court. The same is true as to the judgment appealed from.

We can see no good answer to the claim that appellant's proposed bill of exceptions was not served in time. Concededly it was not served in time unless an order attempted to be made granting appellant an extension of time within which to serve it was valid. This order was made September 7, 1904, by the judge of the superior court of San Mateo County. By reason of the fact that said judge was related to an attorney for appellant by affinity within the third degree, he was, by express provision of statute, prohibited from sitting or acting as judge in the case, and for this reason a judge of the superior court of Santa Clara County had presided at the trial of said action.

The language of our statute upon the subject (Code Civ. Proc., sec. 170), as it existed at the time of this order and until the amendment of 1905, was, so far as is here material: "No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding: . . . 2. When he is related to either party, . . . or to an attorney, counsel, or agent of either party, by consanguinity or affinity, within the third degree, computed according to the rules of law. . . . But the provisions of this section shall not apply to the arrangement of the calendar, or to the regulation of the order of business, nor the power of transferring the action or proceeding to some other court, or the hearing upon such affidavits and counter affidavits," (affidavits alleging and denying bias or prejudice). The statute thus expressly stating the exceptional matters as to which a disqualified judge may act, it must be taken as specifying all such matters, and as absolutely prohibiting the disqualified judge from performing any judicial act not included in the exceptions designated. (See *People v. De la Guerra*, 24 Cal. 77; *Estate of White*, 37 Cal. 190, 192.) The making of an order under section 1054 of the Code of Civil Procedure, extending the time allowed by that code within which an act in an action or proceeding may be done, is a judicial act, involving the exercise of judicial discretion. Such an order may be made by the judge only "upon good cause shown" to him. He is the sole judge of the sufficiency of the showing, and when he makes such order he judicially determines the showing to be sufficient, and as a result thereof grants a privilege to one of the parties to the action to which such party would not otherwise be en-

titled. He thus judicially acts in an action in which he is disqualified to act at all, other than as specified in the exceptions enumerated in the statute.

By no reasonable construction of the language used can the making of such an order be held to fall within any of the enumerated exceptions. It is not an order relative to the "arrangement of the calendar" or a "regulation of the order of business," and manifestly no other exception stated could possibly apply. The case before us is, in this respect, precisely the same as that of *Frevert v. Swift*, 19 Nev. 363, [11 Pac. 273], where it was held, upon a substantially similar statute, that an order of this character could not be made by a judge who was disqualified to act in the case. The reasoning of the opinion in that case appears conclusive to us.

It is suggested that as section 1054 of the Code of Civil Procedure provides that orders extending time may be made "by the judge of the superior court in and for the county in which the action is pending, or by the judge who presided at the trial," it was intended to allow the judge of the county, even though disqualified, to make the same, but we are satisfied that the provisions of this section must be read subject to the express prohibition of section 170 of the Code of Civil Procedure, to the effect that *no* judge shall sit or act in any proceeding wherein he is disqualified by the provisions of that section, other than in the specially excepted cases enumerated therein.

The judge of the superior court of San Mateo County was, therefore, without power to make the order extending time. It is overwhelmingly settled that under statutes like our section 170 of the Code of Civil Procedure, as the same existed prior to its amendment in 1905, expressly prohibiting a judge from sitting or acting in certain specified cases, any act of the disqualified judge in violation of the provisions of the statute, is absolutely void wherever brought in question. (See note, *Moses v. Julian*, 84 Am. Dec. 126, [45 N. H. 52]. See, also, *Frevert v. Swift*, 19 Nev. 363, [11 Pac. 273]; *People v. De la Guerra*, 24 Cal. 77.)

The order extending time within which to serve the proposed bill of exceptions was absolutely void. The proposed bill of exceptions was, therefore, not served in time. In the absence of an order relieving appellant under section 473 of the Code

of Civil Procedure from the effect of the default, upon a proper showing made, the bill should not have been settled or considered on the motion for a new trial. No order relieving appellant from such default has ever been made. There is, therefore, no legally settled bill of exceptions on motion for a new trial which can now be considered, or which could have been considered on the hearing of the motion for a new trial in the court below. Regardless of the reasons which may have actuated the trial court in denying the motion for new trial, the denial of the motion was necessarily correct, there being no legally settled bill of exceptions or statement showing any error on the trial.

It appears from the bill of exceptions settled on the hearing of the motion to dismiss appellant's proceedings for a new trial, that, at the time the motion was argued and submitted, appellant did make a conditional motion to be relieved from the effect of the failure to serve its proposed statement in time, "if there was such failure," upon the ground of mistake, inadvertence, and excusable neglect, and supported such motion by affidavit, which affidavit is not contained in the record. It affirmatively appears from the bill that the trial court never ruled on this conditional motion for relief, and denied the motion for dismissal solely on the ground that there was no default, and appellant acquiesced in this action of the court, not even excepting to the failure to rule upon the motion for relief. It is now suggested that the case may be remanded with directions to the court below to pass upon the motion for relief. We are satisfied that it must be held that the appellant, by thus acquiescing in the action of the trial court and voluntarily submitting its motion for a new trial upon such legal record as then existed, waived and abandoned its motion for relief under section 473 of the Code of Civil Procedure.

The judgment and order are affirmed.

Shaw, J., and Sloss, J., concurred.

[S. F. No. 4006. Department One.—January 19, 1907.]

LILIAN B. HARDY and HARRIET A. PARLIN, Appellants, v. ADA C. MARTIN, Administratrix of Estate of Robert C. Chambers, Deceased, et al., Respondents.

ATTORNEY AND CLIENT—EVIDENCE—PRIVILEGED COMMUNICATIONS.—

Communications made by clients to their attorney concerning a material matter of controversy for which he was employed in their behalf during the existence of the relation between them are privileged and are not admissible against the clients without their consent.

ID.—OBJECT OF STATUTE—PROTECTION OF CLIENT—EXISTENCE OF RELATION.—

Subdivision 2 of section 1881 of the Code of Civil Procedure, respecting privileged communications between attorney and client, is intended for the protection of the client, and to encourage him to give to the attorney whom he consults the fullest information concerning the facts upon which he asks the attorney's advice or action; and if the relation existed when the communications were given, the subsequent cessation of the relation does not make the communications admissible.

ID.—ACTION TO SET ASIDE DEED—FRAUD AND UNDUE INFLUENCE—CONFLICTING EVIDENCE—ADMISSION OF LETTERS TO ATTORNEY—MATERIAL ERROR.—

In an action to set aside a deed alleged to have been procured from plaintiffs by the fraud and undue influence of an uncle, who had long stood to them in a relation of trust and confidence, and whose promises they relied upon, though he did not intend to keep them, where there was evidence tending to sustain the plaintiffs' action, and counter-evidence in support of the defense, and the judgment was against the plaintiffs, it was material error requiring a reversal of the judgment to admit letters written by plaintiffs to an attorney employed by them, while the relation of attorney and client subsisted, which contained admissions material to the defense.

ID.—IMMATERIAL CIRCUMSTANCES—CESSATION OF RELATION BEFORE DEED

—ACTION OF CLIENTS—ATTORNEY AS WITNESS TO AGREEMENT.—The circumstances that the relation of attorney and client was discontinued before the execution of the deed, and that the clients acted independently in the conveyance to their uncle out of their personal regard for him and in reliance on his promises; and that the attorney subsequently became a witness to a written agreement made contemporaneously with the deed, even if his signature was requested by them, could not tend to make their previous letters to the attorney, written while the relation of attorney and client subsisted, admissible, or to waive their right to object to their introduction in evidence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Dorn & Dorn & Savage, for Appellants.

Aylett R. Cotton, and L. A. Redman, for Respondents.

SHAW, J.—This is an action to set aside a deed, alleged to have been procured by the fraud and undue influence of the deceased, Robert C. Chambers.

The plaintiffs are the nieces of the deceased wife of Robert C. Chambers.

Their mother died in 1875, when they were small children. In 1884 Chambers was married to their mother's sister, Eudora A. Chambers, and from that time until her death in 1897, and afterwards until their respective marriages, the plaintiffs lived with Robert C. Chambers as members of his household and family. In 1896 Chambers conveyed to his wife the property in dispute. She had made a will in 1884, devising all her property to her said husband in trust for the equal benefit of the two plaintiffs and their grandmother on their mother's side, Mrs. Tolles, which trust, however, was to cease with respect to the plaintiffs when they respectively became eighteen years of age. They arrived at that age several years before the death of Mrs. Chambers, and consequently, upon her death, they each became seized of an undivided one third of her estate in their own right and entirely free from the trust. The charge is that after the death of Mrs. Chambers, and while he was executor of her will, Robert C. Chambers obtained from them a conveyance of their shares in the real estate described in the complaint, consisting of about forty-six acres of land, situate in Butte County in this state, and referred to in the evidence as the Palermo property, and that said conveyance was obtained from them by means of fraud, undue influence and without any consideration. The fraud charged consisted of promises that he would make a will giving them a substantial part of his estate, which was large and valuable, and that he would also during his lifetime give them sums of money for

their use, which premises, it is alleged, he had no intention of performing. The undue influence alleged arose from the long residence of the plaintiffs during their tender years as members of the family of said Chambers, and the mutual affection and esteem which arose therefrom, whereby they had learned to trust him and have great confidence in him.

The action was tried by the court, and findings and judgment were given in favor of the defendants. The plaintiffs appeal from the judgment and also from an order denying their motion for a new trial.

From the statement used on the motion for a new trial it appears that after the death of their aunt, Mrs. Chambers, the plaintiffs had employed an attorney to look after their interests in the estate, and that from that time until the execution of the deed in controversy, said attorney had advised them concerning the same, and had been consulted by them during negotiations leading up to the execution of the conveyance, and that while these were pending they had each written to him several letters relating to the matter, containing some admissions in regard to the facts sought to be established on the trial of the case. Upon the trial the defendants offered these letters in evidence. Objections were made on the ground that they were confidential communications between attorney and client and on that ground inadmissible. The objections were overruled and the letters admitted, to which the plaintiffs excepted, and this ruling is assigned as error.

We are at a loss to perceive on what ground the evidence was admitted. Subdivision 2 of section 1881 of the Code of Civil Procedure provides that: "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." That these letters were those of the client to an attorney, concerning the very matter of the controversy for which he was employed in their behalf, appears from the contents of the letters, beyond question. That the statements herein contained constituted material evidence in the cause was also apparent; indeed, it is not disputed. It seems to have been claimed that the relation of attorney and client did not exist, or rather that it did not continue down to the moment of the execution of the deed, and further,

that the advice of the attorney was not taken or given concerning the question of the policy to be pursued by the plaintiffs with regard to the execution or non-execution of the deed. The fact that the relation of attorney and client did not exist at the moment of the execution of the deed, or for a considerable time prior thereto, would not render the communications admissible, if such relations existed at the time they were made. The statutory provision above quoted is intended for the protection of the client and to encourage him to give to the attorney whom he consults the fullest information concerning the facts upon which he asks the attorney's advice or action, and if the relation existed at the time the communications are given, the subsequent cessation of that relation does not make the communication admissible. Nor do the circumstances that, after having made the communications with the view of procuring the advice or assistance of the attorney, the client concluded to act upon his own motion, and did so act without receiving any advice from the attorney, make such communication admissible, and particularly where, as in this case, the attorney merely stated to the plaintiffs that if they were disposed to make the conveyance to their uncle out of their personal regard for him, that was a matter upon which he would not presume to advise them. They still had the right to freely inform the attorney of all the facts affecting their case, with a view to having his direction concerning the law, and to have the protection of the statute to prevent disclosure of the communications made to him.

The case of the *Estate of Wax*, 106 Cal. 347, 348, [39 Pac. 624], is cited, wherein the court says that when a testator requested his attorneys to sign his will as attesting witnesses, "he in effect consented that whenever the will should be offered for probate, they might be called on as witnesses and testify to any facts, within their knowledge, necessary to the establishment of its validity." We do not think this decision has any bearing upon the question in this case. The attorney was not a witness to the deed sought to be set aside, but was an attesting witness to a contemporaneous document stating the terms of the agreement in pursuance of which the deed was executed. It does not appear either from the instrument itself, or from any evidence in the case, who requested the attorney to sign his name as a witness. That, however, we

deem to be immaterial. The reasons advanced in the *Estate of Wax*, 106 Cal. 347, 348, [39 Pac. 624], for the admission of the testimony of an attorney concerning the occurrences attending the execution of a will are that it is necessary to allow the testimony of such witnesses in order to enable the beneficiaries under the will to secure its probate. The decision in that case does not go beyond allowing the attesting witnesses to give their testimony concerning the occurrences at the time of the execution of the will. The letters introduced in the case at bar were not communications made at the time of the execution of the deeds or the instrument to which the attorney had subscribed his name as a witness, but were letters long prior thereto, and contained statements of facts bearing upon the matter, which statements must be regarded as confidential, and it cannot be conceived how the request of the plaintiffs, conceding that they did request the attorney to sign as a witness, could be understood by them, or could be considered by the court, as constituting a waiver of their right to object to the introduction in evidence against them of the previous statements made to him as their attorney. We think the admission of the letters was clearly erroneous.

A judgment would not be reversed for the admission of such testimony if it appeared that the evidence could not have affected the case. It does not appear, however, in this case, that the evidence was so immaterial as to have been harmless. There was evidence directly tending to prove that the deceased had made the alleged promises without intending to perform them, and that the deed was executed in reliance upon those promises, and because of the undue influence possessed by him over them, arising from the relations of confidence and trust existing between them. There was also evidence tending to show that the property in controversy had been conveyed by the deceased to his wife under a naked trust whereby she was to hold the same for his benefit, that this was understood by all the parties, and that the deed in controversy was made for the purpose of terminating this trust. The conflict between these two theories and the question which of the two was correct, was the principal question in the case. The statements in the letters introduced in evidence tended to prove the latter and disprove the former. We think it was material evidence of considerable weight and

that it cannot be said to have been without effect upon the decision. There are other questions in the case which are discussed in the briefs, but as they relate to merely technical matters and may not arise upon another trial we do not think it necessary to consider them.

The judgment and order are reversed.

Angellotti, J., and Sloss, J., concurred.

[S. F. No. 3603. Department One.—January 19, 1907.]

MILWAUKEE MECHANICS' INSURANCE COMPANY,
Appellant, v. **A. M. WARREN et al.,** Defendants; **J. B.**
LANKTREE et al., Respondents.

ACTION ON BOND OF INSURANCE AGENTS—FINDINGS AGAINST EVIDENCE—

NEW TRIAL.—In an action by an insurance company on the bond of its agents for insurance moneys collected and not paid over, where the judgment was for the defendants, *held*, upon review of the evidence, on motion for new trial, that the findings that the insurance agents had accounted for and paid over all moneys belonging to the plaintiff, had no substantial support in the evidence, which clearly showed, without conflict, that they were indebted to the plaintiff in a considerable sum for moneys actually received and not accounted for; and the new trial must be granted.

ID.—MUTILATION OF BOOKS — REFERENCE — QUALIFIED REPORT — TESTIMONY — TRIAL WITHOUT OBJECTION — OBJECTION UPON APPEAL.—

Where the books of the agents were mutilated, rendering an accounting difficult, and the case was referred and the referee made a qualified report, which was treated as a *prima facie* showing of indebtedness, and the referee and other witnesses were examined, and cross-examined by defendants' counsel, and the case was tried without objection on the theory that the report of the referee was properly before the court, and that his written statements and oral testimony were evidence in the case, and defendants having permitted the trial to proceed and the case to be submitted on this theory, are bound by it, and cannot be permitted to raise for the first time on appeal an objection which could have been obviated if made in the court below.

ID.—CONTRACT WITH AGENTS—CHARGE OF PERCENTAGE FOR RETURN PREMIUMS ON SURRENDERED POLICIES.—Where, under the contracts with the agents, they were to have thirty-five per cent of the gross premiums received by the company in their territory "after deduct-

ing all return premiums, rebates and insurance," they were properly chargeable in their accounts with all "return premiums" on surrendered policies after they had been credited with thirty-five per cent of the full amount of the premiums on insurance written by them, and these commissions on the "return premiums" are chargeable against the sureties on their bonds as well as against the principals. This contemplates a continuance of the accounts after the termination of the agency for the purpose of charging commissions on return premiums and rebates.

ID.—DEDUCTIONS FOR REINSURANCE.—Deductions for reinsurances should only be for those effected during the existence of the agency.

ID.—ACCOUNTS WITH SUB-AGENTS.—The agents are responsible for the payment of sub-agents, and the commissions of the sub-agent is a matter between the agents and the sub-agents, with which the company had no concern, and this item should not be taken into account at all in the accounts between the company and its agents. But where in closing up business written by the agents, the premiums for which had not been collected prior to the termination of the agency, the company did not collect the full premiums, but so much of them as remained after deducting the commissions of the sub-agents due from the agents, such commissions were properly chargeable to the agents as an item of expense required to be paid by them.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

E. W. McGraw, for Appellant.

Reddy, Campbell & Metson, Campbell, Metson & Campbell, Edward K. Taylor, and Thomas H. Breeze, for Respondents.

SLOSS, J.—On March 10, 1894, the plaintiff, an insurance corporation, entered into a written agreement with the defendants, A. M. Warren and J. B. Lanktree, whereby said Warren and Lanktree were appointed general agents of the company for the Pacific Coast from April 15, 1894. One of the conditions of the appointment was that the agents should give to the plaintiff a bond in the sum of twenty thousand dollars to secure the due performance of their duties, and such bond was accordingly executed and delivered by A. M. Warren and J. B. Lanktree as principals and J. D. Maxwell, A. A. Warren and William P. Jones as sureties.

The agency terminated on May 1, 1895, and this action was brought on the bond to recover \$12,976.07, claimed to have been collected by Warren and Lanktree for the plaintiff and to be due from them upon the termination of the agency. The defendant A. M. Warren was served but did not appear, and his default was never entered. The defendant A. A. Warren was never served. The defendants Lanktree, Jones, and Maxwell appeared and answered, denying that Warren and Lanktree had failed to account for and pay over to the plaintiff any moneys received by them for it. Findings and judgment went in favor of the defendants who had appeared. The plaintiff moved for a new trial, which was denied, and now appeals from the judgment and from the order denying its motion for a new trial.

On the appeal from the judgment the plaintiff contends that some of the findings are insufficient in form, and that there is a failure to find upon one material issue. In the view which we take on the other appeal we consider it unnecessary to pass upon these points.

The motion for new trial was based on the alleged insufficiency of the evidence to sustain the findings to the effect that the defendants Warren and Lanktree "did account for, pay over and deliver to said company and its authorized agents all of the money that came into their hands which belonged to the said company, and every part and portion thereof, over and above all commissions and allowances due to them, said Warren and Lanktree, and over and above all payments made by them for said plaintiff," and "that said Warren and Lanktree did not collect, receive or retain, and that they do not retain, and did not at the time of the commencement of this suit retain, the sum of \$12,976.07 of the moneys of plaintiff, or any sum or moneys whatever belonging to said plaintiff." An examination of the statement on motion for new trial convinces us that these findings have no substantial support in the evidence.

The agreement under which Warren and Lanktree were acting for the plaintiff, after stating that said Warren and Lanktree have been appointed by the said Milwaukee Mechanics' Insurance Company as its general agents and supervisors for its Pacific Coast department, contained the following stipulations:

"2. All agents' commissions, salaries, clerk hire, office, traveling and adjusting expenses, rents and telegrams to be paid by said Warren and Lanktree, excepting taxes, board fees, costs of litigation, and all company blanks, policy registers, expressage for supplies to agents only, and other supplies necessary to the business, which are to be paid and furnished by the said company and which are to remain the property of said company.

"3. As compensation for such services as general agents and supervisors, the said Milwaukee Mechanics' Insurance Company agrees to pay to or allow Warren and Lanktree to retain 35 per cent of the gross premiums received by said company in the territory hereby denominated the Pacific Coast department, after deducting all return premiums, rebates and reinsurances.

"4. The said Warren and Lanktree agree to . . . keep accounts of agents, collect and remit all balances of accounts, as collected, and for moneys received by them, to the company by draft. Said Warren and Lanktree to give a good and sufficient bond with approved sureties for \$20,000 thereby securing the said company for all premiums reported and moneys received in their department. No premiums to be left uncollected and unpaid for a longer term than ninety days from the first of the month following the month in which they were written.

"5. A contingent commission of 5 per cent of all the net profits realized by said company from business done within the territorial limits and places aforesaid; said net profits to be ascertained by deducting from gross premiums on policies and certificates of insurance underwritten for said company on property located within the territorial limits and places aforesaid, the amounts paid out and allowed by said company for losses, commissions, return premiums, reinsurances, cancellations, licenses, taxes of any kind, and all other local and general agency expenses. The said contingent commission shall be computed and paid on the 15th day of October, 1895. If this contract shall not be renewed, the contingent commission then due on the above date shall be computed by said company by charging up to loss account 50 per cent of the premiums upon policies then in force, and at the expiration of all policies of insurance in force, after deducting for any

losses and return premiums, the balance, if any, shall be paid to Warren and Lanktree. This contract to remain in force for the term of one year, to wit: from the 15th day of April, 1894, to the 15th day of April, 1895, with the privilege to either party hereto to terminate the same at any time by giving sixty days' notice."

The bond sued upon was in the sum of twenty thousand dollars, and after reciting the appointment of Warren and Lanktree and their duty to keep true and accurate accounts of the property of the company coming into their hands, and of their receipts and disbursements on account of the company, provided that if "the said A. M. Warren and J. B. Lanktree shall well and truly perform all and singular the duties of general agents of said company, and shall account for and pay over and deliver to the treasurer of the said company, or to such other person as the said company, or its authorized agent, may direct, all such moneys, property, documents, supplied books and papers, and stationery of the said company, as shall come to and be in their possession, or actual control at the time, and in the manner which may now or hereafter be provided by charter or rules of the said company, or by direction of its board of directors, or of the president or acting president of the said company, . . . then this obligation shall be void, otherwise of force."

From the statement on motion for a new trial, it appears that when the case came on for hearing, the plaintiff offered in evidence the deposition of G. W. Mansfield, superintendent of agencies of the plaintiff company. Mr. Mansfield testified that he came to San Francisco in the early part of April, 1895, to examine the condition of the company's affairs and its general agency. Up to the 15th of May he was endeavoring to secure from Warren and Lanktree a statement of their accounts with the company. On the 17th of May, on arriving at the office of Warren and Lanktree, he was informed that the vault of that firm had been entered during the night and the books of account had been cut and mutilated to such an extent as to make it impossible to state an accurate account from them, and no complete statement of account was in fact ever given by Warren and Lanktree. The witness produced copies of the monthly accounts which had been sent to the company at its home office by Warren and Lanktree dur-

ing the continuance of the agency. These accounts showed the total amount of business written, the premiums due on the same, the commissions credited to Warren and Lanktree upon the basis of the total business written, and the expenses chargeable to the company. They did not show the amount of premiums actually collected. Plaintiff then called as a witness one Thomas, bookkeeper for Warren and Lanktree, who testified to some extent regarding the mutilated books, pointing out in detail the pages that had been removed from such books. At this point in the trial the court made an order appointing George W. Reynolds referee, "to make an accounting and take evidence and report the same to the court." This order was made on May 12, 1898. No further proceedings appear to have been had in court until January 21, 1901, when, as appears by the statement, the hearing was resumed, and there was presented and read to the court a report of the referee. This report points out at considerable length the difficulties encountered by the referee in the making up of an account between the parties, such difficulties arising from the mutilation of the books and from a loose method of keeping the accounts of Warren and Lanktree. Accompanying the report the referee submitted to the court several tabulated statements showing the condition of the accounts between the plaintiff and Warren and Lanktree, so far as the referee was able to trace them. These statements, however, were declared by the referee not to be final, but to be subject to the instructions of the court as to certain points involved in the taking of the accounts. As they stood, the statements of the referee showed that Warren and Lanktree were indebted to the plaintiff in the sum of something over nine thousand dollars. Thereupon the referee was questioned at great length by counsel on both sides and by the court, and at the close of his examination other witnesses were called and the case was finally submitted to the court.

The contention of the respondent is that inasmuch as the case was referred to the referee to state an account, and as he never did state a final account, there was no evidence whatever before the court and nothing upon which a finding in favor of the plaintiff could be predicated. Probably it would have been better practice, in view of the fact that a reference had once been made, for the court to either resubmit the mat-

ter to the referee, with instructions to make a final report based upon such directions as to the manner of making the accounts as the court might see fit to give, or, if the court decided to hear the matter itself, to vacate the order appointing the referee, and proceed to take testimony. Neither of these steps was taken. What seems to have been done was that the referee made his partial or qualified report, and then testified as a witness regarding the items of his account, and that upon this testimony, and that of other witnesses, the court made its findings. If this procedure was irregular, we think the respondents are in no position to take advantage of such irregularity. No objection was made by them to the course followed. All of the parties in the lower court appear to have proceeded upon the theory that the referee's statements of account attached to his report were to be taken as *prima facie* showing of an indebtedness of some nine thousand dollars due from Warren and Lanktree to the plaintiff, and that further testimony—i. e. that of the referee himself and of other witnesses—was to be taken to increase this apparent balance or reduce it, as the case might be. After the referee had submitted his report, a colloquy took place between court and counsel, the court stating in effect that the report of the referee made out a *prima facie* case in favor of the plaintiff to the extent of nine thousand dollars, and that counsel for defendants could take up, one by one, the items charged against Warren and Lanktree, and seek, by eliminating some of them, to reduce or extinguish this apparent balance. The only answer made to this by counsel for defendant was a request for a continuance before commencing the examination of the referee. The continuance was granted, and when the hearing was resumed the referee was cross-examined on the lines indicated by the court. At a later period in the proceedings the court repeated substantially the same suggestion without dissent from either party. And still later the court said to counsel for plaintiff, "Now Mr. Reynolds has presented his report and he has made a *prima facie* case for you to an amount that I understand is satisfactory. Now why not let Mr. Campbell (counsel for defendants) have him as a witness?"

No objection was made by counsel for the defendants to any of these statements of the court. He acquiesced in them

and proceeded to examine the referee and the other witnesses on the lines suggested. There can be no question that the case was tried in the court below upon the theory that the report of the referee was properly before the court, and that the written statements of the referee, as well as his oral declarations in court, were evidence in the case. The defendants, having permitted the trial to proceed and the case to be submitted for decision upon this theory, are bound by it and cannot be permitted to raise for the first time on appeal an objection which could have been obviated if made in the court below. It has often been held by this court that where both parties have in the trial court treated a certain question of fact as being in issue, and offered evidence regarding it, the point that there was no such issue presented by the pleadings is waived and cannot be raised on appeal. (*Horton v. Dominguez*, 68 Cal. 642, [10 Pac. 186]; *Murdock v. Clark*, 90 Cal. 247, [27 Pac. 275]; *Klopper v. Levy*, 98 Cal. 525, [33 Pac. 444]; *Burnham v. Stone*, 101 Cal. 164, [35 Pac. 627]; *Illinois T. & S. Bank v. Pacific Ry. Co.*, 115 Cal. 285, [47 Pac. 60]; *Barbour v. Flick*, 126 Cal. 628, [59 Pac. 122]; *Willey v. Crocker-Woolworth National Bank*, 141 Cal. 508, [75 Pac. 106].) The principle governing these cases is applicable here. Strictly speaking, the referee's partial report and his explanations regarding it may not have been proper as evidence, but they were admitted without objection and were treated by both sides as evidence in the case. If the defendants had excepted to the report of the referee when it was presented, or had made any objection to the referee being examined as a witness to establish any of the items in the account, or had asked that the matter be resubmitted to the referee, with instructions to report a full account, the plaintiff could have protected itself by taking steps to have the hearing proceed in a manner conforming completely to the proper practice. After both parties have gone to a hearing in the lower court upon the understanding that the report of the referee was before the court as making a *prima facie* case, and that further evidence was being heard for the purpose of confirming or setting aside the particular items of that report, it would be the height of injustice to permit the respondents, who assented to that procedure, to now claim that the method pursued was not the proper one, and that there was in

fact nothing before the court. (21 Ency. Plead. & Prac. 664.)

It appears from the record that in a number of instances, where policies had been written by Warren and Lanktree, return premiums were paid by the company after the termination of Warren and Lanktree's agency. In making up his statements of account the referee charged to Warren and Lanktree thirty-five per cent of these return premiums, and there was a good deal of discussion in the lower court as to the propriety of this charge. Under the contract it is clear that Warren and Lanktree were chargeable with these payments. The agreement under which they were appointed general agents provided that as compensation for their services they were to receive thirty-five per cent of the gross premiums received by the company in their territory "after deducting all return premiums, rebates and reinsurances." The term of their agency was one year. It is a matter of common knowledge that most policies of fire insurance are written for a term of not less than one year, many extending over three years. In the natural course of business, therefore, policies written after the day upon which the agency commenced would extend beyond the duration of the agency. The insured had a right to surrender their policies at any time prior to the expiration of the period of insurance, and to receive a return of a proportion of the premium corresponding with the unexpired term. (Civ. Code, sec. 2617.) In Warren and Lanktree's own accounts, and in those of the referee, they had been credited with thirty-five per cent of the full amount of the premiums on insurance written by them. Under the terms of their contract they were, however, entitled to this thirty-five per cent only on the amount of the premiums "after deducting all return premiums, rebates and reinsurances." Certainly it was never understood by the parties that if Warren and Lanktree wrote a policy on the day before the expiration of their agency, they would be entitled to retain thirty-five per cent of the entire amount of the premium, even though on the day after they ceased to be agents the policy was cancelled by the insured and the company compelled to return the greater part of the premium. It was necessarily in the contemplation of the parties that return premiums might be payable after the termination

of the agency, and the right of Warren and Lanktree to retain thirty-five per cent of the premiums on any business written by them was always subject to the contingency that the policy might be canceled and that they might, therefore, be liable to the company for thirty-five per cent of the amount refunded by the company upon such cancellation. (See *American Steam Boiler Ins. Co. v. Anderson*, 6 N. Y. Supp. 507, [57 N. Y. Sup. Ct. Rep. 179].) If it be said that under this construction there could be no final settlement of account on the termination of the agency, it may be answered that the contract plainly shows that such immediate settlement was not within the purview of the parties at the time the contract was made. Under paragraph five, Warren and Lanktree were entitled to a contingent commission on the profits of the company, to be computed and paid on the fifteenth day of October, a number of months after the termination of the contract. Again, by paragraph four, they were allowed ninety days within which to collect premiums. Clearly, then, it was in the contemplation of the parties that their relations should not be capable of final adjustment immediately upon the close of the agency.

These commissions on return premiums are chargeable against the sureties on the bond as well as against the principals. It is true that by the terms of the undertaking the sureties made themselves liable only for the payment by Warren and Lanktree of such moneys, etc., of the said company "as shall come to and be in their possession or actual control." They could not be charged with premiums earned but not collected. But where premiums had actually been collected, the proportion of them that belonged to the company was to be determined by the contract of agency, and, as we have seen, such proportion was to be computed by deducting, as commissions of the agents, not thirty-five per cent of the gross premiums, but thirty-five per cent of the balance remaining after payment of "return premiums, rebates and reinsurance." While the sureties were liable only for moneys actually received by Warren and Lanktree during their agency, the amount payable by Warren and Lanktree out of such moneys could not be ascertained at the termination of the employment, but might be increased by subsequent cancellations, and consequent reduction of the commissions apparently earned.

In this view of the rights of the parties under the contract and bond, the statements and testimony of the referee, together with the testimony of the other witnesses, make it clear, and that without any conflict, that Warren and Lanktree were indebted to the plaintiff in a considerable amount, for money actually received and unaccounted for. Just what that amount was it is not proper here to attempt to state, since upon this appeal we can go no further than to order a new trial. It is sufficient here to say that the careful analysis of the evidence presented by the appellant in its brief shows that under any view of the testimony there was an indebtedness of several thousand dollars due from the defendants to the plaintiff. The respondents do not attempt to point out any error in these calculations, but content themselves with the claim, heretofore disposed of, that there was no evidence at all before the court, and argue as to the actual figures presented by the referee and other witnesses, that the statements presented were so confused that no conclusion could be reached from them. With this view we cannot agree. The court had before it statements of all of the transactions of Warren and Lanktree as agents, and these statements, if examined in the light of the contract and the bond, were sufficient to enable the court to arrive at a determination of the amount due from Warren and Lanktree and their sureties to the plaintiff. That some amount was so due is, as we have said, clear, and is practically not disputed by the respondents. The court below, therefore, erred in finding that Warren and Lanktree had fully performed the conditions of their contract, and that there was nothing due from them. Upon a new trial the state of the account between the plaintiff and Warren and Lanktree should be determined in view of the construction which we have herein given to the contract.

Something may be said regarding other points which may arise on a new trial. As to reinsurances, we think only those effected during the agency of Warren and Lanktree should be considered as operating to reduce their commissions, and, as we understand appellant's brief, it claims no more than this.

Under the terms of the bond the defendants were not chargeable with premiums on business written by Warren and Lanktree, where such premiums were not collected by Warren

and Lanktree, but came into the hands of their successors. Under the contract of agency, however, Warren and Lanktree were entitled to a credit of thirty-five per cent of such premiums—i. e. of so much of said premiums as might remain to the company after deducting return premiums, whenever paid, and premiums paid for reinsurances effected by Warren and Lanktree.

There appears to have been a good deal of discussion at the trial regarding commissions paid by Warren and Lanktree to sub-agents. We see no reason why this item should be taken into account at all. Under paragraph two of the contract the sub-agents' commissions were to be paid by Warren and Lanktree. Where a sub-agent acting for them wrote a policy and remitted to them the premium, deducting his commission, such agent was acting not as the agent of the company, but as the agent of Warren and Lanktree, and, as between the latter and the company, Warren and Lanktree were chargeable with the whole premium, and were to be credited with thirty-five per cent of the whole. The commission of the sub-agent was a matter between Warren and Lanktree and such sub-agent, with which the company had no concern. Where, however, in closing up business written by Warren and Lanktree, the premiums for which had not been collected prior to the termination of their agency, the company collected not the full premium, but so much of it as remained after deducting the commissions of the sub-agents due them by their agreement with Warren and Lanktree, such commissions were properly chargeable to Warren and Lanktree as one of the items of expense which, under paragraph two of the contract, they were to pay.

By proceeding in accordance with the views herein indicated we think it will be possible on a new trial, notwithstanding the mutilation of the books of Warren and Lanktree, to state and prove an account which will show with substantial exactness the relation of the parties.

The judgment and order appealed from are reversed.

Shaw, J., and Angellotti, J., concurred.

Hearing in Bank denied.

[S. F. No. 3802. Department Two.—January 26, 1907.]

COMMERCIAL AND SAVINGS BANK OF SAN JOSE,
Respondent, v. F. S. POTT et al., Appellants.

PROMISSORY NOTE—CONSIDERATION—SALE OF STOCK—SUPPORT OF FINDING.—In an action upon a note, the consideration of which was assailed, a finding that the consideration was the sale of shares of stock in a corporation is sufficiently sustained where testimony for the plaintiff, an admission in the answer, and the terms of the contract of purchase showed that it was a sale, and it appears that the stock was transferred on the books in the name of the purchasers, who finally disposed of the same as owners.

ID.—TERMS OF CONTRACT—COLLATERAL SECURITY—DIVIDENDS—POWER OF DISPOSITION.—The fact that the contract provided that the stock was to be held by the vendor as collateral security for the purchase money, and that while so held all dividends thereon should be owned by and paid to the transferees, does not tend to negative their ownership of the stock where it also gave them full power to sell and dispose of the stock while so held.

ID.—ACTION UPON SECURED NOTE OF ONE PURCHASER—EVIDENCE—ORAL AGREEMENT—GUARANTY TO CO-PURCHASER.—Where the note sued upon was the secured note of one purchaser of the stock, to which the other was not a party, evidence that the payee had given to the other purchaser an oral promise to guarantee him against liability on the note in suit was immaterial for the want of such liability, and incompetent to affect any right of contribution between the co-purchasers upon payment of the note, and also as being inadmissible to change or vary the terms of the written contract for sale of the stock by any prior or subsequent oral agreement.

ID.—EVIDENCE—ACTUAL VALUE OF STOCK AT TIME OF SALE—QUALIFICATION OF WITNESSES—MARKET VALUE.—It was not error to exclude the evidence of witnesses as to the actual value of the stock at the time of the sale, with respect to which there was no evidence of their qualification to testify on that subject, where it appears that so far as its market value was concerned they were allowed to testify.

ID.—FICTITIOUS MARKET VALUE OF STOCKS—IRRELEVANT EVIDENCE.—Where there was no evidence showing that the stock in question had any fictitious value in the market, it was not error, after appellants' witnesses had been allowed to testify as to the absence of a market value of the stock, to exclude as irrelevant a general question whether stocks may not have a fictitious value in the market.

ID.—CONSTRUCTION OF ISSUES AND FINDINGS—FRAUD—CONTRACT AS TO INTEREST AND DIVIDENDS—NON-LIABILITY FOR INTEREST—DEFENSE NOT PLEADED.—Where the court found for plaintiff for the note

and unpaid interest and against the defenses of want of consideration and fraud of the vendor of the stock in misrepresenting its value, and the answer in pleading the fraud set forth part of the terms of the contract representing and guaranteeing that interest would be kept paid out of dividends, and alleged there were no dividends or resources therefor, but did not especially plead the defense of non-liability for interest, the court was not required to find thereupon, or to find whether there were sufficient dividends paid upon the stock to discharge the interest on the note.

APPEAL from an order of the Superior Court of Santa Clara County denying a new trial. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

James H. Campbell, Edward F. Treadwell, and Van Fleet & Mastick, for Appellants.

Cobb & Rea, for Respondent.

LORIGAN, J.—This action is upon a non-negotiable promissory note given by the defendants, F. S. Pott and wife, to A. G. Field, and by him indorsed and transferred to the plaintiff for value before maturity. It appears from the findings that about a month prior to November 1, 1892, the defendants F. S. Pott and P. P. Austin entered into negotiations to purchase from said Field his real estate and insurance business in the city of San Jose, and also six hundred and fifty shares of the capital stock of the Western Granite and Marble Company, a corporation for many years organized and existing under the laws of this state, and having its principal place of business in said city of San Jose; that said Pott and Austin, having made due and proper investigation as to the value of said capital stock of said corporation, entered into and executed a written agreement with said Field whereby the latter sold and transferred to said Pott and Austin said real estate business and said capital stock for the sum of \$45,750, to be paid, ten thousand dollars in cash, which was paid, the balance to be evidenced by the promissory notes of said Pott and Austin in various amounts bearing date November 1, 1892. Said stock to be held by said Field as collateral security for the payment of said notes. In addition to the notes above referred to, which did not represent the entire

payment to be made and secured by said stock as collateral. it was provided that said Pott and Austin were to give two other promissory notes of five thousand dollars each, to be indorsed and secured in such manner as might be approved by said Field. It was further agreed that said Pott and Austin should have full and absolute power to sell and dispose of the said capital stock at any time. All the notes, including the latter two, were given as provided for, and this suit is on one of the latter notes given by the defendant F. S. Pott and his wife, she having signed the same as the security provided for in the contract. In negotiating for the sale of the real estate and insurance business and the capital stock, the value of the former was fixed at ten thousand dollars, and the cash payment which was made represented its purchase price; the value of the capital stock was fixed at fifty-five dollars per share, amounting to \$35,750, represented by the various notes given, including the one in suit.

This action was commenced on the note in question some five years after the sale of the stock and delivery of the note.

The defense interposed was that there was no consideration for the note, it being averred that the capital stock for the purchase price of which the note was given had no value at that time. In addition to this it was further averred that the sale and delivery of the note was occasioned through the fraudulent concealment and representations of Field as to the business and affairs of the corporation and of the value of its stock. It is claimed that an additional defense was interposed, but that will be considered later.

Upon the issues specifically mentioned above the court found against the defendants, and the judgment was rendered for plaintiff for the principal and interest on said note.

A motion for a new trial having been denied, defendants appeal from that order alone.

While various specifications appear in the bill of exceptions relative to the insufficiency of the evidence to sustain the decision of the court, no discussion save as to one is made in the briefs. This is addressed to the finding of the court that there was a sale of the stock by Field to Pott and Austin. As against this finding, it is contended on the part of the appellants that the evidence shows that the arrangement

between Field and Pott and Austin as to the shares of stock was not a sale, but simply an ingenious plan to raise money on the stock. There is no merit in this claim. By the terms of the contract it was a sale; the stock was transferred upon the books of the corporation to Pott and Austin; the contract provided for an option in Field to repurchase within two years from Pott and Austin such portions of the stock as might remain unsold; Pott and Austin paid an assessment on it long after it was transferred to them; they held it for several years after such transfer and ultimately disposed of it. The answer of the defendants treats the transaction as a sale and seeks to defeat the purchase of the note given by claiming that there was no consideration for it, and that the purchase was induced by fraudulent representations. The measures taken by Pott and Austin to ascertain the value of the shares of the capital stock pending negotiations for its purchase, and the testimony of witnesses on the trial, show it was a sale. All these matters support the finding of the court that it was a sale, and there is no pretense from the evidence that it was anything else. In fact, the only basis which the counsel for appellants has for claiming that there was not a sale of the stock is that the agreement between Field and Pott and Austin recites that the latter "shall be the owners absolutely and completely of any and all dividends accruing to or payable upon said stock." It is claimed that this provision impliedly negatives ownership. We think, however, no such deduction follows. It is quite clear why this provision was inserted. The contract itself declared a sale to Pott and Austin of the stock, but provided that Field should hold it as collateral security for certain of the notes given for its purchase. In order, however, to clearly define what the rights of the purchasers should be while Field so held it, it was declared in the contract that Pott and Austin should have full and absolute power to sell and dispose of said stock while it was so held as security, and the provision quoted by appellant relative to dividends was for the purpose of giving them beyond any question the right to any dividends payable on said stock while it was so held. So that, from appellants' standpoint there is nothing to disturb the decision of the court that it was a sale, while, on the other hand, it is fully sustained by the facts which we have called attention to.

This disposes of the only point made as to the insufficiency of the evidence, and we now approach the next ground urged for a reversal—namely, that the court erred in its rulings relative to the admission of evidence. Appellant offered to show that Field, the vendor of the stock, agreed to give a written guaranty to Austin that he would never have to pay any part of the principal of the note given by him for the purchase price of said stock, and it is insisted that the court erred in refusing to admit such evidence. We do not see how this evidence was material. The note sued on here is a note given by F. S. Pott, with his wife as the security required under the contract with Field. There was no privity between Austin and Pott on this note. Austin could not be held upon it. The stock was delivered upon the execution of the notes called for in the contract, it became the property of the vendors, was used by them as their own and ultimately disposed of by them. The sale in that respect was fully executed. If any such arrangement was entered into by Field and Austin prior to the execution of the contract, it must be deemed to have been abandoned. It is no part of the written contract, and by the terms of that contract must the rights and obligations of the parties be determined. If this arrangement was entered into subsequent to the execution of the written contract, it could not affect that contract, because it would be a matter in which Austin and Field were alone concerned. Field had the right to release Austin from all obligation to him under the contract or upon the notes, and Pott could not complain that any of his rights were infringed on by reason of such release. Under the agreement Pott and Austin were to give Field their joint notes for \$25,750 of the \$45,750 to be paid for this capital stock and deliver to Field the stock as collateral security. In addition to this, and as part of the purchase price, they were to give two individual notes in five thousand dollars with other security approved by Field. In pursuance of this provision of the contract, Pott gave the note sued on with his wife as security. Austin could not be held on this note. He was not a party to it. If, as between Pott and Austin, the latter would be liable to Pott for his proportion of the amount paid on the note, any agreement between Field and Austin could not affect this liability. Independent, however, of these considerations, any agreement

made prior to the contract under which the sale was consummated, or any subsequent agreement, was inadmissible to change or vary the terms of the agreement as actually made and consummated.

It is further contended in this line that the court erred in rulings upon questions asked of the witnesses tending to show what the market value of the stock of the corporation was at the time of its purchase by Pott and Austin. Counsel refer to several rulings of the court in this respect, but when we examine the testimony of the witnesses during whose examination it is claimed these errors were committed, we find no ground for complaint. These inquiries were addressed to the actual value of the stock at the time of the sale, and there was no showing that the witnesses were qualified to speak on that subject, and as far as the inquiries were directed to the market value, it appears that the witnesses did testify upon the subject. Nor was any error committed on the question of a fictitious value of the stock. Counsel for appellant made inquiries of witnesses who were called by him to testify concerning the market value of the stock in question as to whether stock may not have a fictitious value in the market. Conceding that it may, we do not perceive that any error was committed in refusing to allow witnesses in the case at bar to testify on that subject. There was no evidence of any facts upon which it could be claimed that the stock in question had a fictitious value, and proof that such a condition might exist as to stocks generally could have no relevancy. The very witnesses of whom this inquiry was made testified that the stock in question at the date of the sale had no market value at all, so that whether in the market stocks might have a fictitious value or not was of no consequence.

The last and the principal point made on this appeal (the point strongly urged by counsel appearing in place of those who originally filed the opening and reply briefs on this appeal, and who made no particular insistence on it) is that the court failed to find upon a material issue in the case, to wit: whether dividends were paid upon the stock sufficient to discharge the interest on the note.

Counsel for appellants contend that this issue was before the court for determination, and counsel for respondent contends that it was not; that the court found on all material

issues raised by the answer which were only, whether at the time of the sale the stock purchased was of any value, and whether the sale was made through fraudulent representations of Field as to the value of said stock.

The contract which was entered into between Field and Pott and Austin at the time the note was given, and which is attached to the findings of the court as part thereof, contains the provisions that "The said Field hereby agrees and guarantees to said Austin and Pott that the yearly dividends upon said capital stock will be sufficient in amount to pay and discharge all interest due and payable upon all said notes in case of any deficiency, or in case of any contingency whatever whereby such dividends are not sufficient in amount to liquidate and pay all of said interest, then said Austin and Pott are to receive credit upon said notes for such deficiency, or at the option of said Field said deficiency may be paid in coin."

The answer of defendants contained, among other allegations, the following: "That in and by the terms of said agreement, and in order to continue and consummate his said fraud, the said Field did agree and guarantee to said parties that the interest upon the said notes about to be executed in accordance with said agreement would be kept fully paid by and out of the dividends declared and paid upon said stock." And another allegation set forth further on in the answer stated "that no dividends whatever had been declared or paid by said corporation, or by the officers thereof, upon said or any stock of said corporation since the first day of November, 1892, nor have there been any profits whatever earned or received by said corporation, nor any other resources from which said dividends could have been declared."

These are the two allegations upon which it is contended by appellant that the issue was raised upon which the court failed to find; that they constituted a special defense against the liability of the appellants for interest upon said notes. It is quite clear, however, when considered with relation to the main special defense interposed, and of which they formed part of the allegations—namely, fraudulent representations of the vendor Field as to the value of the property for the purchase price of which the notes were given—that these particular allegations were never intended to constitute the special defense which they are now urged to have presented.

These allegations are found in a long continuous recital of facts constituting a special defense of fraud upon which appellants relied to defeat the entire action. Notwithstanding that this is clearly apparent, counsel for appellants insist that they have now a right to treat these allegations as a special defense on the subject of interest, commingled with the special defense of fraud. The difficulty, however, with this claim of a right to segregate is that there is nothing to segregate. There has been no commingling of defenses. The allegations upon which appellants rely as constituting a special defense to the payment of interest are not commingled with the other special defenses of fraud, but they are apt, material, and proper allegations of facts supporting that claim alone, and were obviously not intended for any other purpose. Take the first allegation relative to the terms of the contract. It is distinctly made with reference to the defense of fraud. Up to this point in the answer the defendants were alleging fraudulent representations of Field leading up to the negotiations which eventuated in the making of the agreement, and in proceeding with their story in that respect alleged that, "in order to continue and consummate his said fraud," he made the agreement relative to the dividends. This was simply one of the particulars in which it was alleged the fraud consisted. It is not an allegation that by the contract the appellants were only under a contingent liability for interest, but it is one of the many fraudulent representations charged to have been made by Field of which appellants complained. As to the other allegation relied on, that "no dividends whatever had been declared or paid," etc., this is not used in the answer in connection with the allegation last referred to except as relating to the special defense of fraudulent representations and the worthlessness of said stock when purchased, and which worthlessness they allege continued up to the filing of the answer. This is apparent from many prior and subsequent allegations. No mention is made in this allegation of interest, nor is there anywhere in all the allegations of the answer the slightest hint that these allegations, or any other allegations, have reference to a special defense of non-liability for interest. It is to be observed, too, that in the first allegation quoted the full terms of the contract between Field and the appellants with reference to liability for interest are not stated. Nor, as

far as that liability is concerned, is it stated at all in the answer. The provision of the contract was that the dividends upon the capital stock would be sufficient in amount to pay and discharge all of the interest due and payable upon said notes, and in case of any deficiency, or in case of any contingency whatever whereby such dividends were not sufficient in amount to liquidate and pay all of said interest, the makers of the note were to receive credit upon the notes for such deficiency, or, at the option of Field, said deficiency might be paid in coin. It will be perceived that in the allegation first quoted, which refers to such provision, only the first portion of it is alleged; only that portion in which it is agreed that the interest would be kept fully paid up out of the dividends on the stock. As constituting one of the particular misrepresentations relied on in the special defense of fraud, this was all that was necessary to be pleaded of the contract. On the other hand, had this allegation been intended to serve in a dual capacity—as an allegation of fraud and also as an allegation presenting a special defense of non-liability for interest—it need hardly be suggested that to have alleged the other portion of the provision of the contract, as to the contingent liability of the makers, which was omitted, would have better indicated that non-liability as to interest was relied on. The fact that it was not alleged is some indication that the portion which was pleaded was only intended as a recital in aid of the special defense of fraud, and for no other purpose.

It was also alleged in the complaint that “no part of the principal or interest of said promissory note had ever been paid and the whole thereof, principal and interest, is now due, owing and unpaid.” This allegation was admitted by the defendants by failure to deny it, but to defeat the entire action thereon the defendants set up want of consideration and fraud. If the defendants had, in addition to specially pleading these defenses, also specially pleaded non-liability for interest, the court might, while finding against them on the defense of want of consideration and of fraud, and that they were liable for the principal of the note, have yet found, if the evidence supported it, that under the terms of the contract they were not liable for interest. But in order to avail themselves of this latter defense it was their duty to plead it specially, and they did not do so. In fact, it is clear to our minds that the only

special defense urged by appellants in their answer, aside from the want of consideration for the notes, was that of fraud, and that the allegations quoted were pertinent to that defense, had particular and sole relation to it, and were intended to present it alone. This being true, we are aware of no rule of law which will permit us to wrest particular allegations from their plain position as part and portion of a continuous and apt recital of a special defense of fraud and treat them as allegations constituting another special defense which it is not pretended was separately and specially pleaded, and which it is obvious they were not designed to support.

We perceive no reason why the order denying the motion for a new trial should not stand, and it is therefore affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[L. A. No. 1616. Department Two.—January 28, 1907.]

CONSTANCE M. GOYTINO, Appellant, v. CITY OF LOS ANGELES, Respondent.

ACTION TO QUIET TITLE—DEDICATION OF PUBLIC STREET—PRESCRIPTION—CONFLICTING EVIDENCE—INTERRUPTION OF POSSESSION—SUPPORT OF FINDING.—In an action to quiet title, involving a claim of prescriptive title to a street prior to an acceptance by the city defendant of a dedication thereof upon a recorded map, a finding against such title was sustained by proof that plaintiff's adverse possession thereof was interrupted by the superintendent of streets before the lapse of five years from the date of commencement of adverse possession, as shown by conflicting evidence for the defendant against the testimony of plaintiff to an earlier date.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

Dunnigan & Dunnigan, for Appellant.

W. B. Mathews, City Attorney, and Lester R. Hewitt, for Respondent.

McFARLAND, J.—This action was brought by plaintiff to quiet her title to certain lots of land in the city of Los Angeles. Judgment went for plaintiff as to all the land except that part last described in the complaint, which the city of Los Angeles alleges to be a public street called Leonis Street. As to the last-named land the court found that plaintiff had no title thereto, and that it was a public street, and rendered judgment as to said land in favor of the city. Plaintiff moved for a new trial and the court denied the motion; and from the order denying the motion for a new trial plaintiff appeals. There is no appeal from the judgment.

The appellant founds her claim of title solely upon prescription, claiming to have fenced in the said land and to have held it by actual adverse possession under claim of ownership for more than five years.

The main features of the case are these: The said piece of land called Leonis Street was formerly part of a larger tract, called Leonis Tract, which was owned by several persons as tenants in common, including appellant. In 1892 there was pending an action entitled *Brousseau v. Leonis*, for the partition of the said Leonis Tract; and in March, 1892, a decree was rendered in said action by which partition was ordered, and a part of the tract was awarded to each cotenant. Appellant was awarded a part of the land designated as Lot 20, which adjoins and faces on said Leonis Street. The referees who had been appointed in the case had made their report, which was accompanied by a map on which was delineated the lots which were to go to the cotenants respectively, and also certain streets, among which was the said Leonis Street. This decree and map were accepted by all the cotenants, and the map was duly recorded. Afterwards, in 1901, the mayor and council of the city of Los Angeles passed an ordinance by which all offers of dedication of streets were formally accepted.

Appellant, however, contends that prior to the passage of said ordinance she had acquired title to this asserted street by prescription. But the court found that she had no title to said land; and the evidence as to the question whether or not she had acquired any title by prescription was certainly con-

flicting. The only evidence on the point offered by appellant was the testimony of her husband, J. P. Goytino. He testified that he was appellant's agent in the management of her business and real property; and that after the decree and early in 1892 he inclosed Lot 20 and also said land designated on the map as Leonis Street by fences, and that since then the appellant had kept the said land inclosed by fences, claiming to own it. But Horace Bell, a witness for respondent, testified that he was one of the tenants in common of the Leonis Tract, and had awarded to him Lots 23 and 25, which face on Leonis Street directly opposite to said Lot 20 of appellant; that three or four years after the date of the decree he went upon the land, and finding some Chinamen intruding on his lots he fenced them in; that appellant had a fence along her Lot 20, and that after he had fenced in his lots there was a fence on each side of Leonis Street, but no fences on the end of said street, and that "this left Leonis Street open"; that several years afterwards he heard that Goytino had closed in the street, and going there he found that Goytino had taken some lumber left there by the witness and had built two fences across Leonis Street; and that he immediately complained to the street superintendent, who afterwards removed the fences and opened the street. While the dates of some of these later occurrences are not given with entire exactness, still Bell's testimony squarely contradicted the testimony of Goytino to the effect that he had fenced in the street in 1892, and showed that there had been no such fencing for three or four years after 1892; and, considering all the evidence, we cannot say that the court was not justified in its finding. Goytino also testified that he planted some trees in the street, but the testimony of Bell was that these trees ran parallel with the south line of Lot 20 owned by appellant, and were "about where the curb line of a sidewalk would run."

The findings are general, responding to the averments of the complaint, which were general. There is no point made as to any want of findings, the position taken by appellant being that the findings were not warranted by the evidence.

The order denying the motion for a new trial is affirmed.

Henshaw, J., and Lorigan, J., concurred.

[S. F. No. 3660. Department One.—January 23, 1907.]

**TRADERS INSURANCE COMPANY, Appellant, v.
AACHEN AND MUNICH FIRE INSURANCE COM-
PANY, Respondent.**

FIRE INSURANCE—REINSURANCE—SURRENDER OF COVERING NOTE AFTER LOSS—MISTAKE—RESCISSION.—An insurance company which had reinsured against part of the risk on one of its policies, and after loss, at the request of the reinsuring company, and under mistake of fact as to the loss, surrendered the covering note of the company, is entitled to rescind the cancellation thereof on account of such mistake, and to recover against the reinsuring company the amount which was actually due therefrom when its covering note was cancelled.

ID.—NATURE OF MISTAKE—UNCONSCIOUS IGNORANCE OF FACT—BELIEF IN NON-EXISTENT FACT.—It is immaterial to the nature of the mistake of fact, under sections 1576 and 1577 of the Civil Code, whether it be considered an “unconscious ignorance” of the fact of loss or a “belief” in the present existence of the property insured.

ID.—RECOVERY FOR MISTAKE NOT INEQUITABLE.—The plaintiff may recover what it has parted with by mistake of fact, where its success would not render a recovery inequitable, nor subject the defendant to any loss which in equity and justice it ought not to suffer.

ID.—INTENT TO SURRENDER UNKNOWN CLAIM NOT IMPUTED—ABSENCE OF EXPRESS UNDERSTANDING.—An intent to surrender an accrued claim, the existence of which was not known, should not be imputed to the plaintiff in the absence of evidence of an express understanding to that effect.

ID.—CLOSED TRANSACTIONS—SUBSEQUENT DEALING WITH ANOTHER COMPANY.—Where the transactions between plaintiff and defendant company had been closed by the loss and the mistaken surrender of its covering note before the second reinsurance was effected in another company, the subsequent dealing by plaintiff with such other company, whatever may be its legal effect, could not destroy the rights thus vested in plaintiff against the defendant.

APPEAL from an order of the Superior Court of the City and County of San Francisco, granting a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Charles W. Slack, for Appellant.

T. C. Van Ness, and Van Ness & Redman, for Respondent.

SLOSS, J.—On the trial of this action the plaintiff had judgment according to the prayer of its complaint. The defendant moved for a new trial on the grounds of errors of law occurring at the trial and insufficiency of the evidence to justify the decision. The motion was granted, and the plaintiff now appeals from the order granting a new trial. It is not claimed by the respondent that the court below made erroneous rulings of law which would justify the making of the order complained of. The facts in the case appear without substantial conflict, and the question before us, therefore, is simply whether upon these facts plaintiff was or was not entitled to judgment.

The plaintiff and defendant are corporations engaged in the business of fire insurance. On the sixteenth day of January, 1901, the plaintiff issued its policy of insurance to the Menan Milling Company, insuring said company in the sum of three thousand dollars from the "16th day of January, 1901, to the 16th day of January, 1902, against loss or damage by fire to a building and grain elevator situated at Menan, Idaho." On January 21, 1901, the plaintiff, desiring to be re-insured in part, offered one thousand dollars of the risk to the defendant, the Aachen and Munich Fire Insurance Company, and that company delivered to plaintiff a "covering note" in the sum of one thousand dollars. This covering note or memorandum contained the following language: "from January 21, 1901 at noon. Insurance under this covering note to cease twenty days from this date at noon, or at such time prior thereto as this company's policy may be issued on above described risk. Dated at San Francisco, January 21, 1901." The plaintiff subsequently sent a formal application for re-insurance to the Aachen and Munich Insurance Company, and this was accepted and signed. On January 25, 1901, the defendant requested the plaintiff to place the reinsurance elsewhere. Thereupon the plaintiff made application to the Norwich Union Fire Insurance Company, which issued a covering note or memorandum which by its terms was to cease "ten days from January 25 at noon, or at such time prior thereto as the policy of this society may be issued on above named risk." On the same day, January 25, 1901, the plain-

tiff returned to the defendant the covering note which it had issued to plaintiff, and the application which plaintiff had made to the defendant was destroyed.

It was subsequently learned that on January 24th, the day before the cancellation, the building and elevator in question had been damaged by fire, causing a loss on account of which plaintiff was obliged to pay, under its policy, the sum of \$2,450 to the Menan Milling Company, and it was further obliged to pay \$102.45 as necessary expenses of adjustment. At the time when the covering note was surrendered and cancelled neither the plaintiff nor the defendant had any knowledge of the fact that a fire had occurred. On learning this fact, the plaintiff tendered to the defendant the premium for the reinsurance, and demanded payment of \$850.82, the proportion of the loss represented by defendant's covering note. On defendant's refusal to accept the tender or to make the payment, this action was commenced, the plaintiff praying that the cancellation of the covering note be set aside, and demanding judgment for \$850.82.

The plaintiff contends that, having surrendered the covering note under a mistake of fact, it is entitled to be relieved from this mistake, and to recover from the defendant the amount which was actually due when the covering note was cancelled. Such was the view originally taken by the learned judge of the trial court, but upon motion for a new trial he appears to have come to the opposite conclusion.

We think the result first reached was the right one. On the 25th of January, 1901, when the covering note was surrendered, the defendant was under a fixed liability to the plaintiff amounting to \$850.82. The plaintiff, not knowing that such liability had accrued, surrendered it to the defendant in exchange for a release of the obligation to pay a much smaller sum as premium. It goes without saying that the covering note would not have been delivered for cancellation if the plaintiff had been aware that the loss had already occurred. It makes no material difference whether we say that the plaintiff consented to the cancellation in the belief that the insured property had not been burned, or, adopting the language of the respondent, say that the plaintiff acted in ignorance of the fact that a loss had occurred. In either view its consent was given through mistake, and was there-

fore subject to rescission. (Civ. Code, secs. 1566, 1567.) "Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed." (Civ. Code, sec. 1577.) If the plaintiff did not act under a "belief in the present existence" of the property insured, it was at least in "unconscious ignorance" of the fact that the property had been injured by fire. That the occurrence of a fire destroying or injuring the property insured was a fact material to the contract (i. e. of cancellation) is manifest. There would seem, accordingly, to be no reason why the party who acted under the influence of such mistake should not be permitted to be relieved from the effect of its action, upon offering to place the other party in the position which it occupied before. It is a familiar doctrine that one who has parted with money or property under a mistake of fact may recover what he has parted with, in the absence of circumstances which would render such recovery inequitable as against the defendant. In this case the success of the plaintiff would not subject the defendant to any loss which in equity and justice it ought not to suffer. The sum recovered would be merely the amount which the defendant had, for an adequate consideration, agreed to pay on the occurrence of the event which has actually taken place. The defendant would be deprived of nothing except the right to set up a release of an existing liability given by a creditor who was not aware that any liability existed, and who would not have given the release if it had been aware of the existence of the liability. It is argued the cancellation of the covering note was intended to operate as a surrender of all liability, past as well as future. This is no doubt true, but it does not answer the point that the plaintiff was acting under a mistake of a material fact when it consented to the cancellation. Not knowing that a loss had occurred, it intended and agreed to wipe out all liability, but it would not have so agreed had it known the facts. Plaintiff's application to be relieved from the consequences of its action presupposes that, unless so relieved, the

defendant's liability on the covering note would be absolutely extinguished.

The respondent contends further that while the appellant surrendered the covering note in ignorance of the fact that a loss had occurred, it did so knowing that a loss *might* have occurred. No doubt it was open to the plaintiff to consent to cancel the reinsurance, agreeing at the same time to take the chance of any loss that might have occurred in the meanwhile. "Where parties knowingly predicate a settlement upon uncertain or contingent matters or circumstances, and where the consequent risk which each is to encounter is taken into consideration in the stipulation assented to, the contract will be valid notwithstanding the mistake of one of the parties." (20 Am & Eng Ency. of Law, 2d ed., 815.) This principle is applied in cases where a policy is issued insuring property from a date anterior to the execution of the policy. The insurer is bound to pay a loss occurring between the date fixed for the commencement of the insurance and the actual execution of the policy, although the fact of such loss was not known when the policy was issued. And this stands upon the ground that the risk is one expressly contracted for. (*Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645, [72 Am. Dec. 379].) But the facts of the present case do not bring it within this rule. We see no reason why the intent to surrender an accrued claim, the existence of which was not known, should be imputed to the plaintiff in the absence of an express understanding to that effect, and there is nothing here to evidence such understanding. In this respect, as in its main features generally, the case bears a close resemblance to *Riegel v. American Life Ins. Co.*, 140 Pa. St. 201, [23 Am. St. Rep. 225, 21 Atl. 392]. There the defendant had issued to Riegel, the plaintiff's intestate, a policy of insurance for six thousand dollars on the life of one Leisenring. Riegel died after paying the premiums for some years. The plaintiff, his widow and administratrix, in order to be relieved from the burden of the annual premiums, surrendered the policy to the company, taking in exchange a paid-up policy for \$2,500. In fact, although the fact was not known to either the plaintiff or the company, Leisenring had died before the exchange of policies was made. It was held that the mistake under which both parties had acted, entitled the plaintiff to be relieved

from the exchange and to be reinstated to her rights on the original policy. This view was restated by the court on a second appeal. (*Riegel v. American Life Ins. Co.*, 153 Pa. St. 134, [25 Atl. 1070].) It is argued by the respondent that in the Riegel case there was no consideration for the surrender by plaintiff, she being then under no obligation to pay further premiums, whereas here plaintiff was by the cancellation relieved from its existing liability to pay a premium. But this distinction does not affect the principle upon which the Riegel case was decided. As was said by the supreme court of Pennsylvania on the second appeal, "In many cases prominence is given to failure of consideration resulting from mutual mistake or ignorance of material facts, but entire failure of consideration is not an essential ingredient in any case."

Much stress is laid by respondent on the dealings between the plaintiff and the Norwich Union Fire Insurance Company, it being claimed that plaintiff transferred its reinsurance from the defendant to the Norwich Union, and that this conclusively shows plaintiff's intent to release defendant from any possible liability, past or future. But the covering note of the Norwich Union did not begin until January 25th, and could not cover a loss occurring on the 24th. If the plaintiff intended to substitute the new insurance for the old, such intention was based on the belief that no loss had yet occurred. And while the plaintiff subsequently applied to the Norwich Union for a policy running from January 16, 1901, the undisputed testimony shows that this application was never acted upon or accepted. Even if it could be said that the Norwich Union did reinsure fifteen hundred dollars of the risk from January 16, 1901, such reinsurance was not effected until January 29th. At that time the transactions between plaintiff and defendant had been closed, and a subsequent dealing between plaintiff and a third company could not destroy the rights vested in plaintiff upon the surrender of the covering note to defendant on January 25th.

The order appealed from is reversed.

Angellotti, J., and Shaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 3995. Department Two.—January 29, 1907.]

J. C. BROWN, Respondent, v. CROWN GOLD MILLING COMPANY, Appellant.

ACTION FOR SERVICES—PLEADING—QUANTUM MERUIT—IMPLIED PROMISE—EXPRESS PROMISE—SURPLUSAGE.—A complaint stating that plaintiff performed certain services for the defendant and alleging their reasonable value, and that they were rendered at the special instance and request of the defendant, states a sufficient cause of action on *quantum meruit*. From these facts the law implies a promise to pay the reasonable value, and an averment of an express promise to that effect is surplusage which will not vitiate the pleading.

ID.—VARIANCE—EVIDENCE OF CONTINGENT CONTRACT—BREACH WITHOUT CAUSE—SUPPORT OF QUANTUM MERUIT—NONSUIT.—Although proof of a contingent contract would be a fatal variance, where a contract to pay a definite sum absolutely is alleged; yet where the cause of action is upon a *quantum meruit*, and a contingent contract has been broken, proof of such contingent contract and of its breach without cause, shows no variance justifying a nonsuit, but supports the *quantum meruit*.

ID.—WRONGFUL DISCHARGE OF EMPLOYEE—RESCISSION OF CONTRACT—RECOVERY OF REASONABLE VALUE OF SERVICES.—Where an employee is discharged by his employer without cause during the term of his employment, he may regard the contract as rescinded, and sue upon a *quantum meruit*, and recover the reasonable value of his services, as if the special contract of employment had never been made.

ID.—IMMATERIAL INFIRMITIES IN CONTRACT—UNCERTAINTY.—A plaintiff in *quantum meruit* does not sue upon an express contract or for a specific performance of it; and it is immaterial what infirmities exist in the contract actually made, or whether it is or is not void for uncertainty, or for any other cause.

ID.—EMPLOYMENT BY CORPORATION—MANAGER DE FACTO—KNOWLEDGE OF DIRECTORS—IMPLIED RATIFICATION.—A contract of employment by a corporation may be made by one who is its manager *de facto*; and where the terms of the contract of employment were known to the majority of its directors individually, and they did not disaffirm the contract, they are deemed in law to have ratified it.

ID.—EVIDENCE—TERMS OF EMPLOYMENT—STATEMENTS OF MANAGER.—Statements made by the manager of the corporation during the course of the continuous employment of plaintiff by the corporation under the manager's authority with reference to the terms of the employment were admissible as tending to show those terms.

ID.—CONTINGENT EMPLOYMENT FOR LIFE—SUCCESS OF BUSINESS—DISCHARGE—EVIDENCE OF PRESENT CONDITION.—Where, by the terms of the contract of employment, plaintiff, as an expert assistant in a

business, was to have a position for life when the business was successful, with ample remuneration, and meanwhile was to have a small weekly salary for living expenses, his discharge could be justified only by proof of cause therefor, or that the business was in fact a failure; and mere evidence that it had not paid expenses and that the company had present indebtedness not paid, without any pretense of failure of the enterprise, was inadmissible.

ID.—RECEIPTS OF WEEKLY SALARY IN FULL—MEASURE OF COMPENSATION—EXPLANATION OF PURPOSE—INSTRUCTIONS.—In view of the circumstances and terms of the contract, the court properly refused an instruction that receipts for weekly salary "in full for account" must be regarded as a deliberate admission that the rate of compensation stated therein was the rate expressly agreed upon, and properly instructed the jury "that a receipt is never conclusive; it is always open to explanation, and the purpose for which it was given may be shown."

ID.—SERVICES OUTSIDE SCOPE OF EMPLOYMENT—REASONABLE COMPENSATION—INSTRUCTION—QUESTION FOR JURY.—An employee in a particular service has the right to a reasonable compensation for services rendered outside the scope of his employment, although there is no express agreement therefor. Where plaintiff's evidence justified an instruction to that effect, it was properly given; and the question whether services were in fact rendered by plaintiff outside the scope of his employment was one for the jury to determine.

ID.—INSTRUCTION AS TO WRONGFUL DISCHARGE—FACT NOT ASSUMED—DUTY OF DEFENDANT.—An instruction that if the jury found that the agreement was that plaintiff should work for two dollars and fifty cents per day until the company was in a condition to pay more, or until it got in a more prosperous condition, "then the defendant had no right to discharge the plaintiff without cause," does not improperly assume that plaintiff's discharge by defendant was wrongful, or take that question from the jury. It was subject to a reasonable application by the jury to the evidence; and if defendant wanted it more clearly stated, it should have asked the court to make it so.

ID.—INSTRUCTION AS TO EFFECT OF EMPLOYER'S ACTION.—An instruction "that where a servant has been wrongfully discharged during the term of his service, or where the term of service is otherwise closed by his employer's action, the employee may treat the contract as rescinded and sue on a *quantum meruit* for the reasonable value of the services performed" neither assumes a "wrongful discharge" nor is objectionable in the use of the words "or where the term of service is otherwise closed by his employer's action."

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

Bigelow & Dorsey, for Appellant.

J. J. Scrivner, and Thomas M. Diviny, for Respondent.

LORIGAN, J.—This action was brought by plaintiff to recover from defendant the reasonable value of certain services performed for it from August 1, 1900, to December 14, 1901.

The case was tried before a jury, a verdict rendered for plaintiff for \$2,955, and from the judgment entered thereon defendant appeals, the grounds urged for a reversal being presented upon a bill of exceptions accompanying the appeal from the judgment.

At the close of plaintiff's case defendant moved for a non-suit, which was denied. This is the first error assigned, and in order to properly discuss it it is necessary to state portions of the pleadings and of evidence offered under them by plaintiff.

The complaint, after enumerating the various services performed by plaintiff at the instance and request of defendant, further alleged "that such services were so rendered and performed at the special instance and request of said defendant, and said defendant then and there promised and agreed to pay the plaintiff a reasonable compensation for the same," followed by an allegation of their reasonable value.

The answer admitted the performance of the services as alleged, but averred that plaintiff had agreed to perform them for fifteen dollars per week up to August 3, 1901, and for twenty dollars per week thereafter during the time claimed, which amounts had been paid him weekly and for which he had given receipts.

The evidence on the part of plaintiff showed that the defendant was a corporation organized to exploit a patented machine for the concentration of ores and was endeavoring to make the patent a success. It had a shop in the city of San Francisco, where the machine was manufactured, operated, tested, and shown to those interested in such processes, and it was in connection with the exploiting of this machine that the plaintiff was employed. The plaintiff had been en-

gaged in mining for over thirty years, his specialty being smelting—working in base metal ores which require concentration and smelting. He had acted as manager for mining corporations, understood the duties of one acting in a general advisory capacity as an engineer or metallurgist of such corporations, classifying ores, exploiting machines, composing and writing scientific articles, revising assays, and operating concentrators.

The agreement under which plaintiff entered into the services of defendant was claimed by him to have been made with L. B. Doe, at the time a director and vice-president of the corporation, and, as plaintiff testified, its general manager, and to have been arrived at after negotiations between them taking place at different times. Plaintiff's testimony on the subject was, that he was sent for by Mr. Doe in June, 1900, for the purpose of writing a technical article to appear in a scientific paper, setting forth the value of defendant's concentrator above all others in the market. He prepared this, and at the request of Mr. Doe he wrote also an article on the merits of the machine—a prospectus—for presentation to possible stock-buyers, and for general circulation, and delivered it to Mr. Doe at the office of the company. At that time Mr. Doe stated to him that the articles he had written were satisfactory and the suggestions made as to their process were invaluable; that the company would have to have some one to explain the machine; that none of the members of it were able to do so; that people came in and offered technical objections that they could not meet, nor could they describe the machine as the plaintiff had described it in his articles; that it was a new enterprise just starting in; that the company did not have a great deal of money and were not able to pay large salaries; that the company expected as soon as their plant was in operation to show it and explain it and extol its virtues to visiting mining men; that they expected thereby to do a large amount of business, and expected it would increase the value of the capital stock, so that they could find a market for the treasury stock, and said that he would like to arrange for plaintiff to come there and explain the operation, merits, and advantages of the machine, and wanted to know what he would charge for such services. Plaintiff said he would consider the matter and let him know

the next day. As to what occurred next day plaintiff testified, "The next day I called there and after some general conversation about the machine and the articles and the best method of doing business, I told Mr. Doe that I had thought over the matter, that I was a speculative fellow, and liked to take chances of that kind, had made a great deal of money by taking chances of that kind in mining companies, and considering the condition of the corporation, as he had stated to me, that I was willing to come there and only draw down enough money to live on. He wanted to know what that figure was and I told him seventy-five dollars a month, that I would come there and draw down in cash seventy-five dollars a month, . . . and a call on a certain amount of the stock for the difference. Mr. Doe said to me 'I don't think that the company would like to alienate any of the stock at the present time.' I said 'Well, when the company succeeds—sells its treasury stock, then I can draw the other.'"

Nothing was decided at this meeting, and plaintiff agreed to call next day. On the next day he went to the office of the company, when he and Mr. Doe resumed their negotiations. As to these further negotiations the plaintiff testified: "Mr. Doe said to me he had talked with his partners, as he expressed it, and they thought that they could n't afford to allow me more than \$15.00 a week for the present as compensation. I hardly liked the word, and I said 'Mr. Doe, a plain understanding hurts nobody; I am a thousand times obliged to you for making an opening. Now I would like to know what my duties are going to be.' He said 'Your duties will be to meet visitors coming in, explain the machine to them, meet their arguments against it, and answer any technical objection that they may bring out, and if we need any—if there are any criticisms in the press, we will expect you to answer them, and things of that character.' 'All right,' I said. 'The duties are not onerous, but they require a wide field of knowledge to perform them, and I want you to understand as plainly as I can that \$15.00 is not my compensation for doing this work.' 'Mr. Brown,' he said, 'why I know that, that is no pay at all, that is no salary at all for a man of your ability, I know that, and,' he added, 'as soon as we sell our treasury stock or get any of our machines established, our business established, we will furnish you with a

position as long as you live, we will see that you are amply compensated for the value of the services that you will render.' I said 'Mr. Doe that is perfectly satisfactory to me.' We walked over to the desk where Mr. Wood (a director and general manager of the manufacturing department of defendant) was working before a window, and he called Mr. Wood over to him and said: 'Mr. Wood, I have arranged with Mr. Brown to come here; he is to draw down \$15.00 a week.' 'That is satisfactory,' said Mr. Wood, and he turned his back and walked away."

In this last conversation Mr. Doe stated that it would take the company about six months to get into a condition to sell their stock, at which time the company was to fix the salary of plaintiff, and he was then to be paid the difference between the amount he was to draw and what would be a handsome remuneration for his services considering the circumstances under which he went into the company's employment; that this salary, when fixed, was to date from the time plaintiff went to work, the company to be credited with the amount drawn by plaintiff for living expenses; that the plaintiff was to remain with the defendant until it was proven whether the enterprise was a failure or not; if the company was unable to establish its business, if it was an absolute failure, then the plaintiff could claim nothing against it. That plaintiff went to work under these terms, but, finding that fifteen dollars per week was insufficient to support himself and family, applied to the company for twenty dollars per week, which was allowed him; his salary, however, was never fixed, although he often demanded that it should be, and after remaining with the defendant for the period alleged in the complaint—some sixteen months—he was, without cause, discharged by the defendant.

We have stated the testimony of the plaintiff with reference to the terms of the contract only to illustrate the points made on motion for the nonsuit.

This motion was based first upon the claim that there was a material, fatal variance between the allegations of the complaint and the proof; that the complaint alleged an unconditional positive promise to pay plaintiff a reasonable compensation for his services, while the evidence showed that such promise was not unconditional, but contingent upon the

sale of treasury stock of the defendant, or the success of the corporate enterprise.

There is nothing in this point. If it shall appear that in law plaintiff, on a complaint stating a common count, was entitled to recover under the agreement shown to have been made with him by the defendant, we think the complaint is unobjectionable for that purpose. The claim of appellant is that the complaint states an express promise to pay plaintiff a reasonable compensation for his services. But, as the complaint states that plaintiff performed certain services for the defendant, alleges their reasonable value, that they were rendered at the special instance and request of the defendant, and were unpaid, it states all the facts that were required to be stated on *quantum meruit*. From these facts, which were all that were necessary to be alleged, the law raised a promise to pay. It was not necessary to allege any promise, and such an allegation was a mere conclusion of law from the facts stated. The allegation of an express promise was surplusage, and, that surplusage will not vitiate a pleading, is elementary. (*Wilkins v. Stidger*, 22 Cal. 236, [83 Am. Dec. 64]; *Abadie v. Carillo*, 32 Cal. 173; *De la Guerra v. Newhall*, 55 Cal. 21.)

Appellant relies upon the cases of *Owens v. Mead*, 104 Cal. 179, [39 Pac. 923], and *Nichols v. Randall*, 136 Cal. 426, [69 Pac. 26], in support of its contention. But these cases are not in point. In *Owens v. Mead* the complaint alleged an express agreement to pay a thousand dollars as attorney's fee in a certain action. The proof was that the promise of defendant to pay was not unconditional but contingent. This was held to be a fatal variance, and properly so, because, as the court said, "There is a wide and essential difference between the two contracts, and proof of one will not support a finding that the other was made. The plaintiff's allegation of an absolute promise was not sustained by proof of the contingent promise, and evidence in relation to such contingent promise was not relevant to the issues made by the pleadings." Neither has *Nichols v. Randall* any relevancy. In that case the plaintiff alleged that he deposited with the defendant certain moneys to be loaned by defendant for him, and that defendant guaranteed him nine per cent interest upon said money; that defendant did not loan said money,

but used it in his own business, and subsequently repudiated the trust. The evidence on the part of plaintiff tended to show that defendant had sold lands which he held in trust for plaintiff and fraudulently misrepresented the price obtained, and appropriated the proceeds. As a special contract, to wit: that the money was deposited with defendant to be loaned by defendant, was pleaded, the evidence introduced had no tendency to support this allegation, and hence there was a material variance. The pleadings and proofs in both cases were radically different from those in the case at bar. In the cases particularly referred to, the actions were brought on an express contract, and sought to be sustained by proof of a contingent or implied contract. Here the action is brought not upon an express contract, but upon a *quantum meruit* to recover the reasonable value of services. The contract which was shown by the evidence of plaintiff to have been made was not proven for the purpose of recovering upon it, but for the purpose of showing that it was entered into between himself and the defendant, its terms, and a breach of it on the part of defendant by discharging him without cause, for the purpose of recovering on a *quantum meruit* the reasonable value of the services he performed under it prior to its breach.

This disposes of the point relative to the alleged variance between the allegations and the proof urged as a ground for a nonsuit.

In addition it was urged upon said motion that there was no evidence in the case to sustain plaintiff's alleged cause of action. In this regard it is insisted that the contract claimed to have been entered into between plaintiff and defendant was so indefinite and uncertain in its terms that it could not be made the basis of a recovery. But this is not an action upon the contract. It is not an action for specific performance of the contract, or for damages for its breach.

The complaint here, as we have said, is upon a common count for the recovery of the reasonable value of services performed. Evidence of the making of the contract was for the purpose of showing the terms and nature of plaintiff's employment under it, supplemented by proof of its breach by defendant as a basis for the recovery of the reasonable value of his services. (*Reynolds v. Jourdan*, 6 Cal. 108; *Castagnino*

v. *Balletta*, 82 Cal. 250, [23 Pac. 127].) Under such circumstances it is immaterial whether the contract is void for uncertainty or not. As plaintiff is not suing upon it, these infirmities are of no moment.

Now, as to the law upon this subject. It is the general rule that where an employee is, without cause, discharged by his employer during the term of his employment, he may regard the contract as rescinded and sue upon a *quantum meruit* and recover the reasonable value of his services, as if the special contract of employment had never been made. (2 Ency. of Pl. & Pr., 1011, note; *Reynolds v. Jourdan*, 6 Cal. 108; *Adams v. Pugh*, 7 Cal. 151; *Hartman v. Rogers*, 69 Cal. 643, [11 Pac. 581]; *Castagnino v. Balletta*, 82 Cal. 250, [23 Pac. 127].)

This he may do when no question could arise as to the validity of the contract, and, independent of the other remedies, he has, namely, to regard the contract as broken and immediately sue for damages for its breach, or to treat the contract as still subsisting, and, at the expiration of the term, bring suit for the entire sum agreed to be paid. Where, however, the contract between the employee and the employer is void for indefiniteness or uncertainty, or for other reasons, neither of the last two remedies was available to him, because they can only exist where there is a valid contract, and where there is not, his only remedy is to sue upon a *quantum meruit*. It is held that such an action will lie where services have been rendered upon a contract which was void under the statute of frauds. (*Patten v. Hicks*, 43 Cal. 509.) And by parity of reasoning the same rule must be applied where the contract is void for uncertainty. That it is so applied is supported by the authorities generally, but attention need only be particularly called to the recent case of *Davidson v. Laughlin*, 138 Cal. 320, [71 Pac. 345, 5 L. R. A. (U. S.) 579], in support of such right of recovery. In the case cited the contract was to employ the plaintiff as defendant's agent at a reduced salary during the construction of a building, in consideration of a promise to employ him as agent in its management at a stipulated increased salary after its completion. After the building was completed plaintiff was discharged and brought suit to recover the reasonable value of his past services. The point made on appeal from a judgment in

favor of plaintiff was that no recovery could be had because the contract was indefinite. This court said, "As to the questions of law involved in the case, it seems clear that as the agreement of appellant to employ respondent as agent of the building after its completion, at the agreed compensation, was the consideration of the latter's agreement to take \$60 per month for his previous services, the failure of appellant to so employ respondent was a breach of the contract which released the latter therefrom, and authorized him to treat it as rescinded, and to recover for his services what they were reasonably worth. This, of course, is the general rule applicable to such a case, and it is too elementary to need reference to authorities. It is contended, however, that the rule does not apply in the case at bar because the contract for permanent employment was only for an indefinite time; that it cannot be specifically enforced, and that it could be terminated by either party upon reasonable notice. But this is not an action to compel a specific performance of the contract for employment after the completion of the building, nor to recover compensation for his services after such completion, nor to recover future profits which respondent might have earned after that time if appellant had complied with his said promise of future employment. The action is for services rendered prior to the time when the future employment at \$150 was to commence. It is based upon the theory that appellant's promise of the future employment was the consideration of respondent's promise to do the previous work for a compensation much less than its real value; that each of said promises was part of the contract and that appellant's refusal to perform his said promise abrogated the contract and entitled respondent to recover the reasonable value of his past services. This theory is well founded in legal principles, as it is in consideration of justice and fair dealing."

In the light of this authority we think the contention of appellant needs no further discussion.

It is true, respondent contends that the contract is not subject to the charges of indefiniteness and uncertainty urged against it. This matter we do not discuss, because, within the rule stated, even if indefinite and uncertain, and for that reason void, plaintiff would not thereby be precluded from

recovery for the reasonable value of the services rendered by him under it. This disposes of the alleged error in denying the motion for a nonsuit.

Upon the further points urged: Various specifications are made of insufficiency of evidence to sustain the verdict. Among others it is contended (and this is the only one requiring consideration) that there was no evidence that L. B. Doe was the general manager of defendant, or had any authority or power to make any contract with the plaintiff.

It is true that at the time plaintiff was employed there was no resolution or record of the board of directors by which Mr. Doe, or any one else, was constituted manager of the corporation, or by which any one was authorized to employ or discharge men. Mr. Wood at that time had been appointed manager of the manufacturing department, but his duties had not been defined. Mr. Wood was patentee of the process, and engaged in constructing the machines. He was not the general manager of the company, but only manager of this department. As testified to by Mr. Hockett, the secretary of the board, "the resolution appointing Mr. Wood manager of the manufacturing department is the only resolution on record concerning Mr. Wood. There was no resolution passed appointing him general manager or manager of the testing and sampling department." It was in the testing and sampling department that plaintiff was employed; a department distinct from the manufacturing department. If Mr. Doe was not the general manager when plaintiff was employed, the company had none until Mr. Miller was appointed, or rather his appointment approved after Mr. Doe retired from the defendant. It is conceded law that in order to bind a corporation by his acts it is not necessary that any resolution should be passed appointing a general manager. It will be sufficient if it be shown that he was manager *de facto*, and we think there was sufficient evidence in the case from which the jury might find that at the time plaintiff was employed Mr. Doe was such manager. There is nothing in the point made in this connection that the contract of plaintiff was made with Mr. Wood, manager of the manufacturing department. Plaintiff was not employed in his department, but in the testing and sampling department. Under the evidence the jury were warranted in viewing the conversation with

Wood, after plaintiff was employed by Doe, as merely a statement to him by Doe because all the parties were in the office, and as also explaining to Wood why, thereafter, the plaintiff would be found employed there. Aside, however, from the evidence warranting the jury in finding Mr. Doe was the *de facto* general manager of defendant when the contract with plaintiff was made, there was also in the case sufficient evidence from which the jury could find that the majority of the board of directors of the defendant were advised of the terms under which the plaintiff was in its employment under his agreement with Doe. As they had such knowledge, it was their duty promptly to disaffirm the action of Mr. Doe, if it was unauthorized. Not having done so, they are deemed in law to have ratified it. The majority of the board having knowledge of the facts, it was not necessary, to conclude the company defendant in favor of plaintiff, that his employment should be ratified at a regular meeting of the board. It was sufficient that the majority of the board individually were advised of the terms of the employment of plaintiff by Mr. Doe, and took no measures to disaffirm as directors that employment. (*Pixley v. Western Pacific R. R. Co.*, 33 Cal. 184, 196, [91 Am. Dec. 623]; *Crowley v. Genesee Mining Co.*, 55 Cal. 273, 275; *Gribble v. Columbus Brewing Co.*, 100 Cal. 69, 72, 73, [34 Pac. 527]; *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, [103 Am. St. Rep. 72, 77 Pac. 817].)

The next error assigned is upon a ruling of the court on the admission of evidence. A witness called in chief for the plaintiff testified that he had a conversation with Mr. Doe some four months after the employment of plaintiff, in which Mr. Doe stated that if everything turned out all right with the company plaintiff had a life position with it; that defendant proposed to take care of him, give him a life position, and make up for the services he was then performing.

It is claimed that the defendant could not be bound by the statement of Doe. But Doe was the general managing agent of defendant when this conversation was had; the employment of plaintiff was a continuous one; the statement of Doe was with reference to the services of plaintiff as he was then performing them, and the evidence was at least admissible as tending to show that an agreement with reference to such employment of plaintiff was made between Doe as manager

and plaintiff, as the latter claimed it was, and also to show the terms of such agreement.

It is claimed, too, that the court erred in rejecting testimony offered upon behalf of defendant. Inquiry was made of certain witnesses for the purpose of showing that defendant, in the conduct of its business, had not made money; that it had not made expenses; that there were certain outstanding notes of the company in large amounts which had not been paid. Objections to these questions were sustained, and, appellant claims, erroneously. We do not see that these matters were relevant to any issue in the case. The agreement with plaintiff was that he should remain with the company until it was determined whether the business enterprise in which it was engaged was or was not an absolute failure. Under the contract plaintiff could not be discharged so as to defeat a claim for compensation, unless for cause, or in the event that the business enterprise was in fact a failure. Defendant did not undertake to show that the business was a failure. On the contrary, the evidence on its part showed that the company was still pushing the enterprise and expected to make it successful. The evidence offered and excluded could only tend to show that the business had not yet reached a profit-making stage. This was not material. The business might have been on a fair way to success or be established, and the company not yet making money, or be heavily indebted. A showing as to defendant's financial condition could not defeat plaintiff's claim. It could only be done by showing that the enterprise was a failure, and, as the evidence offered had no tendency to show that, it was properly rejected.

We now approach a consideration of certain instructions, the accuracy of which are challenged by appellant.

As to the first complained of. Upon the trial the defendant offered in evidence various receipts given by plaintiff to defendant. They were each for one week's salary as plaintiff was receiving it, either fifteen or twenty dollars, and recited that they were "in full for above account." Defendant asked for an instruction telling the jury in effect that each receipt must be regarded as a deliberate admission that the rate of compensation stated therein was the rate expressly agreed on; that the acceptance of the amount specified in such receipt was equivalent to an express contract fixing his compensation

at the rate actually paid him. The court refused to give such instruction, and instructed the jury "That a receipt is never conclusive; it is always open to explanation, and the purpose for which it is given may be shown." No error was committed by the court in refusing to give defendant's instruction and in instructing the jury as it did. The evidence of plaintiff showed that these receipts were given for his living expenses under his contract with defendant, whereby he was to receive a larger compensation when a successful stage in carrying on the business of defendant was attained. Appellant's instructions were framed on the theory that payment to plaintiff as evidenced by these receipts was in full for all services rendered during each week. This, however, ignores the other part of the contract claimed by plaintiff, that such payments were only to be in full in the event that the business enterprise of defendant should turn out to be a total failure. Otherwise he was to be paid more per week. The terms of a receipt are to be construed by a consideration of all the circumstances under which it was given. What was intended by giving it, and what its effect is, are matters to be determined by the jury from all the evidence on the subject. The general rule is that receipts in full (as those in question were) may be explained by parol evidence showing the purpose for which they were given. (*Winans v. Hassey*, 48 Cal. 635; *Simmons v. Oullahan*, 75 Cal. 508, [17 Pac. 543]; *Cowan v. Abbott*, 92 Cal. 100, [28 Pac. 213]; *Hardin v. Dickie*, 123 Cal. 513, [56 Pac. 258].)

In the next instruction complained of the court told the jury, in effect, that if they believed from the evidence that the plaintiff was employed by defendant for the sole purpose of exploiting a certain specific machine—that is, explaining it and its mode of operation, and the results produced by it, to persons inquiring concerning it, and meeting arguments and objections made against it—and also find from the evidence that these services were to be rendered at a specified sum per week, which was paid, still if they found that during the term of his employment plaintiff, at the request of defendant, rendered certain services outside the sphere of his employment, he was entitled to recover a reasonable compensation for such services, although there was no express agreement to pay therefor.

we do not see how the defendant was injured because the court did not make its instruction more specific in terms. It was subject to a reasonable application by the jury to the evidence, and if defendant wanted it more clearly and definitely stated it should have asked the court to make it so. The same reasoning applies to the other instruction complained of in its use of the language "wrongfully discharged during the term of his service." Nor do we perceive any valid objection to the use in this last instruction of the expression "or when his term of service is otherwise closed by the employer's action," when considered in connection with the words quoted immediately preceding. This meant, and the jury must have so understood it as meaning, that where an employer, for any other reason than for cause, prevents an employee from discharging his duties under his contract with his employer, such employee may treat the contract as rescinded, and sue on a *quantum meruit* for the reasonable value of the services performed. This we have seen is correct as a proposition of law.

It is claimed that the court erred in rejecting some and modifying other instructions tendered by defendant. We have examined them, and think that no error was committed regarding them.

This disposes of all grounds urged for reversal which merit consideration. No error appearing in the record, the judgment is affirmed.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 4352. In Bank.—January 31, 1907.]

DARBEE AND IMMEL OYSTER AND LAND COMPANY, Appellant, v. PACIFIC OYSTER COMPANY et al., Respondents.

PARTITION—RIGHT TO USE OF STATE LANDS FOR OYSTER-BEDS—CONSTRUCTION OF STATUTE—MERK PERSONAL LICENSE.—An action for partition cannot be maintained in respect of the rights conferred by the "act to encourage the planting and cultivation of oysters," approved March 20, 1874. There is no element of an estate of

inheritance or a perpetual estate conferred by that act; but it grants a mere personal license, not inheritable or transferable, which may be revoked by the state.

APPEAL from a judgment of the Superior Court of Alameda County. William H. Waste, Judge.

The facts are stated in the opinion of the court.

F. J. Russell, for Appellant.

Campbell, Metson & Campbell, Charles Tupper King, J. R. Moulthrop, and Reed, Nusbaumer & Black, *Amici Curia*, for Respondents.

McFARLAND, J.—Plaintiff, a corporation, brings this action for a partition of certain premises which it avers to be “real property,” and avers that it has an “estate of inheritance” therein. A demurrer to the complaint was filed by some of the defendants. The demurrer was general and special, and was sustained in the court below, and judgment was rendered in favor of defendants. From this judgment plaintiff appeals.

The action is based on section 752 of the Code of Civil Procedure. That section is under the head of “Actions for the partition of real property,” and it provides that an action for partition may be brought by one or more cotenants of real property, in which one or more of them “have an estate of inheritance, or for life or lives, or for years.” The court below held that the complaint shows that neither plaintiff nor any of the defendants had an estate of inheritance, or for life, or for years, in any real property, and upon that ground sustained the demurrer; and as we think that this conclusion was right, we need not examine any other question raised in the case.

In the complaint the alleged real property in which plaintiff is averred to have an estate of inheritance is described as follows: “The right to the exclusive use and occupation thereof for the purposes of laying down and planting oysters and taking up and carrying off the same in and from said real property, in accordance with and as provided by the terms of an act of the legislature of the state of California, entitled

'An act to encourage the planting and cultivation of oysters,' approved March 30, 1874." Those parts of said act of March 30, 1874, (Stats. of 1873-4, p. 940,) which are material here, are as follows: The title of the act is "An act to encourage the planting and cultivation of oysters," and the first section is as follows:—

"Any citizen of the United States may lay down and plant oysters in any of the bays, rivers or public waters of this State; and the ownership of and the exclusive right to take up and carry off the same shall be continued and remain in such person or persons who shall have laid down and planted the same." The next sections, down to and including section 8, provide that the person desiring to use the right must define the limits of his claim by stakes, etc., must maintain thereon a sign on which must be painted the words "Oyster Beds," and must record a description of his bed or beds of oysters in the county recorder's office. (In the case at bar it does not appear that appellant complied with these provisions; but we will not consider that matter.) It is further provided that, after he has complied with these provisions, any person who enters thereon and carries off oysters or removes therefrom marks designating boundaries shall be guilty of a misdemeanor. Section 9 is as follows:—

"This act shall not apply to any tide lands which the state may have sold to private parties; *provided, further*, that nothing herein shall be so construed as to interfere with the right of the state to sell and dispose of any of the tide lands, nor to affect in any manner the rights of purchasers at any sale of tide lands by the state."

In the property described in the complaint there is no element of an estate of inheritance, or, as described in section 761 of the Civil Code, a "perpetual" estate. The privilege extended to all citizens by said act to temporarily use the unsold tide lands belonging to the state, if it can be considered as an estate at all in lands, is certainly of no higher dignity than an estate at will. But, in our opinion, it is really nothing more than a mere personal license. That was the view taken of similar statutes by the highest court of Maryland, where the oyster business is a very large one. In *Phipps v. State*, 22 Md. 380, [5 Am. Dec. 654], the court was dealing with statutes like ours and it said: "It abundantly appears

from the nature of the privilege in dispute, as well as from the terms in which it was conferred, that no transfer of the state's title to lands covered by navigable water was contemplated. Permission to use given areas covered by navigable water for a particular purpose seems to be all that the legislature intended, and we think the language of its assent to that use should be construed, not as a grant binding the state, but as a conditional license, revocable at the pleasure of the legislature." Again, in *Hess v. Muir*, 65 Md. 586, [5 Atl. 540, 6 Atl. 673], Alvey, C. J., said: "These statutes, the better to promote the growth and to increase the supply of oysters in the waters of the state, provide that any of the citizens of the state may locate one lot, and only one, of five acres, in any unappropriated ground covered by the tide, and plant the same with oysters, and thereupon he is given exclusive control thereof. This, however, is not a grant of an indefeasible right or estate in the lot thus authorized to be located and planted with oysters. It is simply a conditional or qualified license or franchise, revocable at the will and pleasure of the state. (*Phipps v. State*, 22 Md. 380, [5 Am. Dec. 654].) It is neither inheritable nor transferable, but is purely a personal privilege in the party locating the lot."

The judgment appealed from is affirmed.

Angellotti, J., Sloss, J., Henshaw, J., and Lorigan, J., concurred.

[S. F. No. 3924. Department Two.—February 1, 1907.]

UNION SAVINGS BANK OF SAN JOSE, Appellant, v.
M. DE LAVEAGA et al., Executors of Will of José V.
de Laveaga, Deceased, Respondents.

INSOLVENT CORPORATION—ACTION UPON SUBSCRIPTION BY DECEDENT—
DISTRIBUTION—CLAIM NOT PRESENTED—DISCHARGE OF EXECUTORS—
AFFIRMANCE OF JUDGMENT.—Where it appears that an action by an
insolvent corporation upon a subscription to its stock by decedent
was commenced after distribution of the estate and without any
presentation of claim against it, and a judgment was rendered
against it upon demurrer to the complaint, and that pending the

appeal therefrom the surviving executor and the estates of deceased executors were discharged after final settlement of all accounts, and there is no estate, nor any executor to represent it, and the further prosecution of the action can be of no avail to the appellant, the judgment will be affirmed on that ground.

APPEAL from a judgment of the Superior Court of Santa Clara County. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

E. M. Rea, for Appellant.

Timothy J. Lyons, for Respondents.

LORIGAN, J.—This is an appeal from a judgment entered upon demurrer sustained to the complaint.

The complaint alleged, among other things, that the plaintiff was an insolvent banking corporation in liquidation, heavily indebted and unable on June 7, 1901, to pay its indebtedness, and that an assessment on the capital stock of said corporation was necessary for purposes of liquidation; that on April 1, 1891, J. V. de Laveaga, deceased, subscribed for one hundred shares of the capital stock of plaintiff corporation, of the par value of one hundred dollars each, and that a certificate for that number of shares was then issued to him; that said J. V. de Laveaga had in his lifetime paid but thirty dollars to plaintiff on his subscription to said capital stock, and was indebted for the balance of seventy dollars per share; that said J. V. de Laveaga died on August 14, 1894, leaving a last will which was duly admitted to probate, and the defendants were appointed and qualified as executors thereof; that said executors duly published notice to creditors, and that on February 1, 1896, the time for presenting claims against said estate had expired; that on June 7, 1901, the directors of plaintiff levied an assessment of fifty dollars per share on the capital stock of said corporation, such assessment to become delinquent July 12, 1901, and that the assessment levied on the stock for which J. V. de Laveaga, deceased, had subscribed was five thousand dollars, and was unpaid, and that the plaintiff had elected to recover the entire amount of the assessment by action.

A demurrer to the complaint was sustained by the court below on the ground, as is conceded by both parties, that no claim against the estate of De Laveaga, deceased, had been presented by the bank to the executors.

While respondents contend on this appeal that the ruling of the court in that respect was correct and that the judgment should be therefore affirmed, they have also presented a motion for an order of this court dismissing this appeal or affirming the judgment, upon the ground that appellant here is no longer a party or person interested in the estate of said José V. de Laveaga, deceased, or a claimant against said estate or the assets thereof or otherwise; that the administration of said estate has been finally and definitely settled and closed; and that there is no executor of said decedent, or any administration of said estate, to which any relief asked for by appellant could apply or be made applicable or be enforced.

As a basis for the motion it is shown that a final decree of distribution of said estate has been entered and the executors of the will of said deceased discharged and the estate closed.

A motion similar to this was made in the case of Childs et al. v. M. A. de Laveaga et al., executors of the said J. V. de Laveaga. Both the Childs case and the present Union Savings Bank case involved a claim of liability on the part of the estate of J. V. de Laveaga, arising out of ownership by deceased in his lifetime of this same one hundred shares of stock. In the Childs case the action was by certain depositors of said Union Savings Bank to recover on the proportionate liability of said J. V. de Laveaga, deceased, and there, as here, the suit was brought against his executors.

The motion was granted in the Childs case, and must be also granted in this case.

This action was not commenced until April 24, 1903. It appears from the documents filed in aid of the motion that prior to the commencement of this action, and on June 4, 1900, in the matter of said estate of J. V. de Laveaga, deceased, the superior court before which it was pending entered a decree of final distribution of the estate whereby all the estate was distributed to four distributees. The only appeal taken from the decree was by some of the distributees dissatisfied as to the portion of the estate awarded them.

This decree of distribution was reversed by this court, and subsequently, on March 24, 1904, the superior court entered an amended decree of final distribution. Originally there were three executors of the will of deceased, two of whom died pending administration, leaving M. A. de Laveaga as sole executor. On June 6, 1904, the superior court made an order discharging the surviving executor and the estates of his deceased co-executors, and decreed that the estate was fully distributed, and the trust of administration and of the executors settled and closed. No appeal was taken by any one from either the amended decree of final distribution or final discharge. The distribution of the estate and the discharge of the executors (the only persons sued in this action) is terminative of any right of action or right to a judgment by appellant in this case; there is no estate nor executors to represent it, and the further prosecution of the action cannot be of any avail or advantage to the appellant. (See the opinion in *Childs v. De Laveaga, ante*, p. 281, [89 Pac. 82].)

Upon the showing made of the futility of any further prosecution of this action by the appellant, we think the judgment should be affirmed, and it is so ordered.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 3856. Department Two.—February 1, 1907.]

HAROLD JENSON, by Oscar Jenson, his Guardian ad Litem, Respondent, v. WILL & FINCK COMPANY, Appellant.

NEGLIGENCE—INEXPERIENCED SERVANT—EMPLOYMENT UPON DANGEROUS MACHINERY—DUTY OF EMPLOYER TO INSTRUCT.—When one who is known to be an inexperienced person is put to work upon machinery which is dangerous to operate unless with care, and by one familiar with its structure, the employer is bound to give him such instructions as will cause him fully to understand and appreciate the danger attending the employment, and the necessity for care; and it is a breach of duty on the part of the employer to expose an inexperienced servant, even with his own consent, to such danger without giving him any instructions or cautions.

ID.—INJURY TO SMALL BOY—CHANGE OF EMPLOYMENT—FAILURE TO WARN—SUPPORT OF VERDICT.—A verdict for damages for injury to

a small boy is supported by evidence that he was regularly employed as cash-boy in a store, and was taken therefrom and put, without any warning or instruction, to dangerous work, of which he had no experience or knowledge, in removing large loaded trucks of merchandise from a basement to the sidewalk, on a rickety and uneven elevator without sides to protect his leg from being thrust between the elevator and sidewalk by a sudden movement of the truck, which occupied almost the entire floor space of the elevator, and was liable to shift in transit, and that by reason of such sudden shifting his leg was caught and mangled so that it had to be amputated.

ID.—KNOWLEDGE OF BOY—UNAPPRECIATED PERIL—RISK NOT ASSUMED.

—Evidence that the boy knew that if he projected his foot beyond the elevator it would be injured does not tend to show that he knew and appreciated the fact that the truck might, by reason of its size and construction or position on the elevator, list to the side and push his foot beyond the elevator floor. If, from youth or inexperience, or both combined, he did not appreciate the peril in which such shifting might place him, he is not deemed in law to have assumed the risk of injury, so as to relieve the defendant from any liability in placing him there without warning.

ID.—WARNINGS COMMENSURATE WITH DANGERS.—The warnings or instructions to be given to a young and inexperienced servant must be commensurate with the dangers to which he is exposed, and if special dangers are incident to the employment, particular instructions pointing out those dangers must be given, so that they may be known and appreciated by him.

ID.—KNOWLEDGE AND APPRECIATION OF DANGER—QUESTION OF FACT.—

The law does not expect or exact from a child of tender years the same degree of care, caution, or circumspection that it does from an adult; and whether, in a given case, a minor employee is shown to have had knowledge and an appreciation of the dangers incident to his employment is (except in cases where the evidence unquestionably demonstrates that he did have it) a question of fact to be determined by the jury.

ID.—SIGNS UPON ELEVATOR FORBIDDING PERSONS TO RIDE.—Signs upon the elevator forbidding persons to ride thereon, whether easily read or not, had application only to persons using it for their convenience, and not to servants whose duty and custom it was to take freight up therein, and did not apply to plaintiff, who was ordered to take up the loaded truck to the sidewalk and thence to a new warehouse.

ID.—SUFFICIENCY OF COMPLAINT—REVIEW UPON APPEAL FROM ORDER.—

The sufficiency of the complaint can only be reviewed upon appeal from the judgment, and cannot be considered where the only appeal is from an order denying a new trial.

ID.—INSTRUCTION AS TO NEGLIGENCE—DUTY OF EMPLOYER.—An instruction to the jury (in connection with other instructions relative to the duty of the employer where a minor is directed to perform

hazardous work) pertaining to his legal duty to provide for his employees a reasonably safe place, and that his failure to do so constituted negligence, was properly given.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Jesse W. Lilienthal, and Lloyd & Wood, for Appellant.

Sullivan & Sullivan, for Respondent.

LORIGAN, J.—Plaintiff brought this action to recover damages for personal injuries alleged to have been sustained while in the employment of defendant. The cause was tried before a jury, who returned a verdict in favor of plaintiff for seven thousand five hundred dollars, upon which judgment was entered. A motion by defendant for a new trial was denied, and this appeal is from such order alone. There is no appeal from the judgment. The complaint alleged that on February 9, 1901, defendant was carrying on business in the city of San Francisco and maintaining in the basement of premises No. 100 O'Farrell Street a warehouse, where it kept a stock of merchandise, and operated in said premises an elevator for the purpose of transporting goods from said basement to the sidewalk in front of said premises; that for the purpose of transporting said goods therefrom it was necessary to place the goods in a wheeled truck, which was placed upon the elevator and hoisted thereon to said sidewalk; that prior to the ninth day of February, 1901, plaintiff had been employed as a cash boy in defendant's store, Nos. 818-820 Market Street, and prior to said date had never had any experience whatever in the work of transporting goods in trucks from the basement of said premises, No. 100 O'Farrell Street, to said sidewalk, or any experience whatever in handling or transporting goods in elevators; that on said day defendant, well knowing the inexperience of plaintiff in the work of so transporting goods, and well knowing the inexperience of plaintiff in handling and transporting goods upon the said elevator or any elevator, put plaintiff to work in said basement,

and directed him to attend to the transportation and transfer by means of said wheeled trucks of the goods of said defendant from the said basement; that in order to transport said goods as aforesaid it was necessary for plaintiff, in the performance of such duties, to go on said elevator with the truck load of goods; that the work of transporting such goods in a truck on said elevator was a hazardous undertaking and the hazard was known to defendant and unknown to plaintiff; that plaintiff was unfamiliar with the dangers attending said work which he was ordered to do on said day, and was unfamiliar with the dangers of transporting said goods; that before ordering plaintiff to do the work of transporting goods in said trucks from said basement to the sidewalk, defendant did not give plaintiff any instructions or directions whatever as to the manner in which he should perform his work or transport said goods from said basement; that while plaintiff on said day was in the act of transporting from said basement to the sidewalk on the elevator a large quantity of goods belonging to defendant in one of its wheeled trucks, plaintiff's right leg and foot, without any negligence on his part, were crushed between the platform of the elevator and the sidewalk, and were then and there mangled and bruised; that on account of said injuries it was necessary to amputate plaintiff's leg and foot.

The answer of defendant denied the allegations of the complaint, and set up affirmatively, among other separate defenses, that plaintiff violated instructions, and that he had knowledge during his employment of all the dangers incident to his work in connection with said trucks and elevator, and assumed the risk.

Upon this appeal it is contended that the evidence was insufficient to justify the verdict; that the court erred in denying defendant's motion for a nonsuit, and erred also in its rulings on the admission of evidence and in giving and refusing certain instructions.

The evidence on the part of plaintiff showed that in December, 1900, shortly before the holidays, the plaintiff, then about twelve and a half years of age, and four feet three inches in height, was employed by Mr. Litzius, secretary of the defendant, as cash boy in its toy department, where he was working in that capacity on the morning of February 9,

1901. On this date defendant was in control of premises located in three different places in the city of San Francisco used in connection with its business, these consisting of its store and two warehouses. Its store and salesrooms were at Nos. 818-820 Market Street, in the Phelan building, extended back to O'Farrell Street, with an entrance thereto on said street, and included the ground floor and the basement, the toy department where plaintiff was employed being conducted in the latter place under the management of C. G. Weir. About a block westerly from the store, and at No. 108 O'Farrell Street, in the basement thereof, was an old warehouse of defendant from which, as occasion required, goods were brought to the store on Market Street. This warehouse was in charge of Osma Welk. Defendant had established a new warehouse on the opposite side of O'Farrell Street from its store entrance on that street, and on the day of plaintiff's injury was engaged in removing its goods from the old warehouse to this new one, the employees in the former, with additional employees assigned to the task, doing the work. It was while assisting in this work that the plaintiff was injured, and how he came to leave the toy department and be engaged in the warehouse, and the circumstances surrounding his injury, are best disclosed by the evidence of the plaintiff himself. He testified that on the morning of February 9, 1901, while engaged in the discharge of his ordinary duties as cash boy in the toy department, Osma Welk, who was in charge of the old warehouse, came over to the toy department and stated that Mr. Litzius wanted another boy over at the old warehouse to move goods, and that his superior, Mr. Weir, directed him to go over to the basement to work, and he did so. When he reached there, Mr. Welk said to him: "Take these trucks over; this is your work; take those trucks over to the other warehouse." This was all he said to him; all the direction that was given him as to the task he should perform, or the manner in which he should perform it. There were others engaged in similar work to which he was assigned, and he immediately commenced to do as directed. This work consisted of placing loaded trucks upon a freight elevator, accompanying them on their way in the elevator to the sidewalk above, and then pushing the trucks down O'Farrell Street to the new warehouse. The distance from the

floor of the warehouse basement to the sidewalk was from nine to ten feet. The trucks used were wooden ones, about four feet wide by four feet high, with wheels upon them, those in the center at the sides being larger than those at either end. No direction was given to him by any one as to the operation of the elevator machinery. It was operated by pulling a chain, which he observing others do, did likewise. The trucks could not be taken to the sidewalk unless by this elevator. He did not load the trucks himself. They were loaded by others in the warehouse; he simply pushed them to the elevator, took them up on it, wheeled them to the warehouse, and returned with the empty trucks, doing this all the time unassisted until the last trip made by him, during which his injury was sustained. The persons besides himself engaged in handling these trucks consisted of an able-bodied man and two boys, each one attending to a truck. Some of the loads on these trucks were quite heavy. The elevator was an open one without siding on any portion of the platform, and the floor of the elevator platform, which was about four feet square, was made of wood, was rickety, and had patches on it and a piece of iron. On account of the construction of the trucks with higher wheels midway on the sides than on the ends, they tilted to one end when at rest. For this reason it was necessary that some one should accompany the trucks to the sidewalk in order to prevent their rolling off the elevator. Plaintiff worked from a little after eight in the morning till noon, and, thereafter until the time of the injury, about four o'clock in the afternoon, during which period he handled about fifty trucks upon the elevator, no accident happening to his knowledge during that time. As to the immediate circumstances attending the injury plaintiff testified that he started to take a loaded truck up the elevator accompanied by another boy, a little older than himself, named Clark. When a truck was a large one, one boy pushed and the other pulled it upon the elevator. On this occasion Clark pushed and plaintiff pulled the truck, which was a large and rickety one, on the elevator. One of them stood on either side of the truck after it was placed on the elevator, there being between the side of the truck where plaintiff was and the edge of the elevator just space enough for him to stand in, and the height of the truck was such that he could just see

above the top of it. After placing the truck upon the elevator, each held one end of it, and Clark started the elevator on its ascent. At this point, to quote his testimony, he said: "I was holding on to the truck when I was injured. It was a tilted truck that moved up and down. The side wheels were higher than the end wheels. The side of the truck struck my leg, and that is all I know after that. Jerry Clark stood at one end of the truck and I stood at the other. I held on to the bottom of the truck facing the sidewalk—the side; the bottom of the truck. It was necessary to hold on to it because it would bounce and roll off. Movable wheels that would move and revolve like the wheels of a piece of furniture. They would roll all over. For the purpose of maintaining the truck upon the elevator it was necessary to hold on to the truck." Proceeding he further testified that when the elevator was ascending the truck did not stay straight all the time, and when they had gotten about three fourths of the way up the truck moved sideways, the lower part striking against his right foot, pushing it in between the elevator and the sidewalk, where the foot and leg were so badly crushed as to necessitate immediate amputation a few inches below the knee.

It further appeared from plaintiff's evidence that he had never been engaged before in taking loaded trucks up this elevator; that his doing so on the day he was engaged was the first time that he had ever done it; that no one gave him any warning, direction, or instruction as to any danger existing incident to, or to be apprehended in, doing this unaccustomed work; that aside from the order given him by Welk when he reached the warehouse with reference to the work he was required to do, nothing further was said to him by anybody; that Mr. Finck, who it is claimed by defendant had charge of the basement when plaintiff went to work, saw him engaged in taking the trucks to the sidewalk by way of the elevator, but said nothing to him.

This constitutes the evidence on the part of plaintiff, and constitutes practically the entire evidence on his part, and which it is insisted was insufficient to support the verdict.

The general rule of law applicable in cases of the character made by plaintiff is set forth in *Ingerman v. Moore*, 90 Cal. 410-421, [27 Pac. 306, 25 Am. St. Rep. 138]. There this

court said: "The principles of law governing this class of actions are clearly defined. It is well settled that one who enters the service of another takes upon himself the ordinary risks of the employment; and if he is an adult, and engages to do a particular work, the employer has a right to presume, unless otherwise informed, that the employee is competent to perform it, and understands and appreciates such risks. But, on the other hand, when one who is known to be an inexperienced person is put to work upon machinery which is dangerous to operate unless with care, and by one familiar with its structure, the employer is bound to give him such instructions as will cause him to fully understand and appreciate the danger attending the employment and the necessity for care. This rule is thus stated by the supreme court of Wisconsin: 'We think that it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous, and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely with proper care on his part.' "

This rule has been frequently approved in subsequent cases,—among others, *Mullin v. California Horsehoe Co.*, 105 Cal. 77, [38 Pac. 535]; *Foley v. California Horseshoe Co.*, 115 Cal. 184, [47 Pac. 42, 56 Am. St. Rep. 87]; *Verdelli v. Gray's Harbor etc. Co.*, 115 Cal. 517, [47 Pac. 364]; *O'Connor v. Golden Gate Woolen Mfg. Co.*, 135 Cal. 543, [67 Pac. 966, 87 Am. St. Rep. 127]; *Mansfield v. Eagle Box Company*, 136 Cal. 624, [69 Pac. 425]. These were all actions brought by minors to recover damages for the alleged negligence of their employers, and the doctrine as to liability in such cases was there fully and elaborately discussed, but for the purposes of this case the general rule as above quoted and approved need for the present only be considered.

Now, examining the evidence presented by the plaintiff and applying this rule of law to it. Succinctly stated, this

evidence shows that the plaintiff, a boy of immature years and diminutive size, was taken from his usual occupation as cash boy in one department of defendant's business and ordered to enter upon work in another department to which he was entirely unaccustomed and concerning the proper discharge of which he knew nothing; that this work consisted of taking large loaded trucks which occupied almost the entire floor space of an elevator from the basement to the sidewalk; that the elevator itself which was used for that purpose was rickety and its surface uneven; that the trucks were so constructed as to be liable to shift in transit from their position upon the elevator to the injury of those attending their transportation to the sidewalk; that the elevator was without sides which might protect the operator from having his limbs thrust between the elevator and the sidewalk by the sudden movement of the trucks; that the work to which he was assigned involving the use by him of the trucks and elevator was attended with hazard and dangers of which the defendant was advised; that the plaintiff was entirely inexperienced in the discharge of this character of work; that he was set to the task of doing it in the presence of the dangers which surrounded it, and of which he was unadvised, without any warning or direction whatever as to the risks of injury to which he was subjecting himself.

As the evidence on the part of plaintiff sustained these facts, it must be assumed in support of the verdict, that the jury so found; that they found that the injury sustained by plaintiff was the result of the hazardous employment in which he was placed by his employer while inexperienced and without any warning of such danger and without fault on his part. So finding, under the rule of law we have referred to, the employer was liable in damages for the injury sustained.

It is, however, insisted by defendant that it was incumbent upon the plaintiff, claiming his injury to have resulted from being put to a hazardous employment, to show that he was ignorant of the dangers, and it is insisted that the evidence of plaintiff himself proves that he was not. This latter contention is based on the testimony of plaintiff. On his cross-examination he testified as follows: "On the day of the accident I knew that there was small room between the sidewalk

and the elevator. There was half an inch between the elevator when it got up in place, and the frame that surrounded it and the street. I knew that on the day of the accident, before the accident occurred. The form of the truck and the relative size of the wheels and the relative length and width of the truck I knew on the morning of that day and before I went on the elevator the last time. I did not know that they had those trucks before that day. I knew that when I went up the elevator the last time that if I had my foot and my heel projecting beyond the end of the elevator floor, then when the elevator went up my foot was likely to get hurt. I had experience and intelligence enough to understand that." This evidence, however, only proves that he knew if he projected his foot beyond the elevator he would get injured. It was not evidence that he knew and appreciated the fact that the truck he was taking up in the elevator might by reason of its size and construction or its position on the elevator list to the side and push his foot beyond the elevator floor. He might have had knowledge that the truck might move, but it does not necessarily follow that he appreciated the dangers which might result therefrom. Plaintiff might have had knowledge of the liability of the truck to move and strike him without, on account of his inexperience and youth, having sufficient judgment to appreciate the dangers arising from it. It was one thing for him to have known that the truck would shift, but another thing to have sufficient judgment to apprehend any dangers from it. If from youth or inexperience, or both combined, he did not appreciate the peril in which such shifting might place him, he is not deemed in law to have assumed the risk of injury so as to relieve the defendant from any liability in placing him there without warning. And in order that he might not only know but appreciate these dangers he was entitled to be particularly cautioned and instructed by the defendant concerning them. The rule is that "The master must warn such young servants against the dangers to which their employment exposes them, and he must put this warning in such plain language as to be sure that they understand it and appreciate the danger." (1 Shearman & Redfield on Negligence, 4th ed., sec. 219.) The duty of the defendant when it placed plaintiff to work was to have given particular instructions to

him as to the peculiar dangers which might be anticipated, so that, having them in mind and appreciating them, he might perform his work in safety. If particular danger was to be apprehended from there being but very little space for plaintiff's occupancy on the elevator with the truck on it, and the absence of sideguards, or special danger of the moving of the trucks on account of the rickety condition of the elevator or uneven condition of its floor, or that the trucks, on account of the manner of their construction, were liable to shift from their position while being raised to the sidewalk and strike him, it was the duty of the defendant to have given the plaintiff warning that such particular dangers were to be looked out for. The warnings or instructions must be commensurate with the dangers. If special dangers are incident to the employment, particular instructions pointing out those dangers must be given, so that they may be known and appreciated by a minor employee. The very fact that no warning is given to a child or inexperienced person would naturally lead him to infer, or at least to proceed to carry out the orders of his employer, on the assumption that no danger was to be apprehended.

It is true that where a minor is shown to have known of the special dangers attending work to which he has been assigned, and has sufficient intelligence and judgment to appreciate them, the employer will not be held liable for any injury sustained by him during such work resulting from dangers which he knew and appreciated. Under such circumstances, as in the case of an adult, he will be held to have assumed the risk of injury. The law, however, does not expect or exact from a child of tender years the same maturity of judgment or the same degree of care, caution, or circumspection that it does from an adult, and whether in a given case a minor employee is shown to have had knowledge and an appreciation of the dangers incident to his employment is (except in cases where the evidence unquestionably demonstrates that he did) a question of fact to be determined by the jury. The rule upon this entire subject is declared in *Foley v. California Horseshoe Co.*, 115 Cal. 184, 190 et seq. [47 Pac. 42, 56 Am. St. Rep. 87], where the court was considering the conduct of a boy, nearly two years older than this plaintiff, who had been called to perform a service outside

of the line of his office or employment and was injured. The court said:—

“Where the ordinary and usual occupation of a minor is the running or management of a machine, or is some employment in and about it, and the minor is shown to have knowledge of the working of the machine, its dangers or its defects, and where it further appears that the minor is not of such tender years as to be unable to appreciate the nature of the dangers or defects, it is beyond question the rule, sanctioned by a long line of authority, that he takes upon himself, as will an adult under the same circumstances, the perils and risks of his employment; and that, if injured in the course thereof, he may not look to his employer for compensation.

“But there is a distinction which, as a matter of humanity as well as law, should be drawn between such cases and those where the minor is put to a task which, while within the range of his employment, is to him in his inexperience and youth unusual and strange; and it is a case of the latter kind which we are here called upon to consider. Had the accident to the boy occurred while he was engaged in the ordinary operation of his machine, it could be said without hesitation that knowing the peculiar danger to which he might be exposed by its sudden starting, and knowing as he did that it was liable thus suddenly to start, he continued in his employment, taking upon himself the responsibility for any accident which might result therefrom.

“But the accident did not occur while he was engaged in his ordinary occupation at the machine. It occurred while he was engaged in the unusual task set him, that of screwing on a fallen bolt. It is true that while engaged in this task he had still the knowledge that the machine was liable to start; but does this fact establish that for which appellant contends, viz.: That he had assumed that particular risk while screwing on the nut, as he had assumed it generally in operating the machine?

“We think that as a proposition of law this cannot be said. Were the employee in this case an adult, the rule might well be different; but the very reason why an adult under these circumstances would be held to have taken the risk while screwing on the nut, serves to show the injustice and hardship which would result if it were sought to be applied to a

minor. The question of the taking of a risk, the question of the assumption of responsibility of a given act, is determined as much upon the matter of judgment as upon the matter of knowledge. An adult employee, when the facts are known to him, is presumed in law to exercise the same judgment upon those facts as would the employer. . . . The conduct of the child, however, is and should be viewed and measured by a different rule. Children are taught obedience. They are taught not to oppose their will and their judgment to those in authority over them; but in addition to this, and more important than all, the judgment of the child is the last faculty developed. Knowledge he may have; facts he may acquire, but the ability to apply his knowledge or to reason upon his facts comes to him later in life. . . . The very accidents of childhood come from thoughtlessness and carelessness, which are but other words for absence of judgment.

"When sent out to labor they are told by their parents or guardians to obey. In the factory or shop unquestioning obedience is expected and exacted. They must go where they are sent; they must do as they are told.

"It would be barbarous to hold them to the same accountability as is held the adult employee who is an independent free agent. Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act. And it must, from the nature of the case, be a question of fact for the jury rather than of law for the court, to say whether or not, in the performance of a given task, the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability. This must necessarily give rise to a different rule from that so well established, which measures the conduct of the adult by that which might be expected of the ordinarily prudent person placed in the same position.

"So here the child might well be expected to comprehend the likelihood of accident, and to know how to provide against it, when engaged in his usual employment in front of the machine. But when he is sent to the rear of it, and in among the wheels and mechanism to perform a novel duty, we cannot say, as a matter of law, that he entered upon its performance with a full appreciation of the increased dangers and risks, and with sufficient judgment to know how to

avoid them. These matters, and the further question whether the minor duly exercised such judgment as he possessed, must, therefore, as a rule, be left as considerations of fact for the jury's determination; and it would be an exceptional case which would present them as unmixed questions of law for the determination of the court. . . . The ordinary care which a child of limited judgment and experience is called upon to exercise in a given act is not the same *quantum* of care which the adult would be called upon to use under the same circumstances. Each is required to use ordinary care, but the amount of care which the person of perfected intelligence and judgment must employ, is very different from the amount which the law in its humanity exacts of a minor."

We make these extended quotations from this authority to show that in order to relieve the defendant here from liability it must not only appear that the plaintiff had knowledge that the trucks he was engaged in transporting from the basement to the sidewalk were liable to shift or move, but also that he had sufficient judgment to appreciate the dangers of such movements, and that, whether he did or not, was a question of fact for the jury. In the case at bar the questions whether the plaintiff had knowledge and appreciation of the dangers were matters to be determined by the jury from all the facts in the case, taking into consideration the youth of plaintiff, his inexperience and the work to which he was assigned, the particular character of the dangers attending it, and the failure of defendant to give him any warnings or instructions concerning them. If, therefore, it be conceded that plaintiff had knowledge of the dangers, as appellant claims he had, it cannot be said that under the evidence the jury were not warranted in finding, as they must necessarily have found under the instructions of the court, that plaintiff, by reason of his tender years and inexperience and unadvised of the dangers, was not possessed of sufficient judgment to appreciate them.

Passing now to the next point. It is contended that the plaintiff used the elevator contrary to plain precautionary signs upon it warning him to keep off. These signs, it is claimed, read "No person allowed to ride on this elevator. This means you." And "Keep off this elevator. Dangerous."

Plaintiff claims that he could not read these signs because they were indistinct, but whether he could have read them, or whether he did read them, is, in our judgment, of no consequence. Counsel presses this point under a claim that it was the duty of the employee to put the truck on the elevator, start it up, and then walk up the stairway to the sidewalk. The jury gave no credit to this contention, and the weight of the evidence was against it. These signs undoubtedly were intended to keep persons from using the elevator for their personal convenience and when no freight was being taken up upon it. The evidence shows that it was the custom of employees removing freight to the sidewalk to ride up with it on the elevator. Aside from this, however, the warning could not apply to plaintiff because his direction to take the loaded truck to the new warehouse involved the use of this elevator as the only means of getting it to the sidewalk. All the men employed there were doing so. Mr. Welk, who directed him to take the trucks over, saw him using it, as did Mr. Finck, the president. Under these circumstances, to whomsoever the warning might otherwise apply, it was not intended to apply to plaintiff while engaged in transporting the trucks to the sidewalk by means of it.

It is further insisted that there was no proof that any one in authority gave plaintiff directions to carry goods by the elevator.

It is certain from the evidence, however, that the plaintiff left his place of employment in the store as cash boy to work in the old warehouse of the defendant in transporting the trucks to the new warehouse, and that he spent nearly all day in doing so, having during that period moved some fifty truck loads. It is extremely improbable that plaintiff should be thus found working in a department of the general business of defendant different and removed from the one in which he was employed, and at an obviously harder task than his usual employment entailed, without having been so directed by some one in authority. He claims he was directly instructed to go to work by Mr. Welk. It is claimed, however, that Mr. Welk had no authority to employ him. The evidence shows that Mr. Welk was in charge of the old warehouse on the day plaintiff reported there; that the business being done there was the transportation of the stock on trucks to the new warehouse,

and that Mr. Welk was actually engaged in attending to and superintending its removal. From these facts the jury would be warranted in finding that at least on that occasion and for the purpose in which it was engaged he represented the defendant. But assuming he did not, still the evidence shows that Mr. Litzius, the secretary of defendant, sent over to the store for another boy to work in the old warehouse; that in response to this request Mr. Weir, who was in charge of the toy department and under whose control plaintiff was, directed him to go to the old warehouse to work there. That when he got there he was immediately instructed by Mr. Welk, who was then actually in charge, what to do, and proceeded to do it; that while at work handling trucks by way of the elevator, he was seen doing this work by Mr. Finck, president of the corporation, who testified that on that day he had charge of the old warehouse. Proof of these facts was sufficient to warrant the jury in finding that plaintiff was properly and regularly employed there on the day in question.

This disposes of all of the points made by appellant as to the insufficiency of the evidence to justify the verdict. We have not discussed the merits of the motion for a nonsuit, as the points which were made thereon, in as far as they are pertinent, have been considered under the specifications of insufficiency of the evidence in the motion for a new trial. In discussing in his brief the ruling of the trial court upon his motion for a nonsuit counsel for appellant attacks the sufficiency of the complaint. He insists that in as far as it attempts to state a cause of action for injury sustained by plaintiff growing out of being placed in a hazardous employment without warning or instructions, it is fatally defective. Appellant is, however, not entitled to raise that point on this appeal. He could only do so on an appeal from the judgment, and the appeal in this case is only from the order denying the motion for a new trial. (*Martin v. Matfield*, 49 Cal. 45; *Moore v. Douglas*, 132 Cal. 400, [64 Pac. 705]; *Swift v. Occidental etc.*, 141 Cal. 161, [74 Pac. 700]; *Sharp v. Bowie*, 142 Cal. 462, [76 Pac. 62].)

The court opened its instructions to the jury with one relating to the legal duty of the employer to provide for his employees a reasonably safe place, and that his failure to do so constituted negligence. It is claimed that this was error be-

cause the instruction was not responsive to any issue. We do not think that this point has any force. The instruction was given as defining the general duty of an employer to his employee, and was immediately followed by a number of instructions relative to the duty of the employer where a minor is directed to perform work which in its nature is hazardous.

Exceptions are taken to other instructions given by the court, and to the refusal of the court to give some instructions tendered by appellant. We have examined the instructions given under appellant's claim of error, but perceive no valid objection to them. Those tendered by appellant which were not given were in the main covered by the instructions given by the court on its own motion, and this was sufficient. It also appears from the record that many of the instructions tendered by appellant and which he claims were not given by the court, were, as a matter of fact, given by it almost *verbatim*. The instructions tendered by it which were refused were properly so.

We have disposed of all the points presented which, in our judgment, require discussion. We find no ground upon which the order appealed from should be disturbed, and it is therefore affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 4008. Department Two.—February 2, 1907.]

VINCENT NEALE, Special Administrator, etc., Appellant,
v. ROBERT MORROW, Administrator, etc., Respondent.

MUTUAL LIFE INSURANCE COMPANY—GUARANTEE FUND—NOTES PAYABLE AFTER ACTUAL DEMAND—STATUTE OF LIMITATIONS.—A note given to a mutual life-insurance company incorporated under the act of April 2, 1866, as part of the guarantee fund required by that act, and which by the statute was not intended to be renewed every four years, and by its terms was payable to the order of the insurance company "within five days after *actual demand*, with interest at the then legal rate from and after such demand," the obligation of which has never been discharged, is not subject to the operation

of the statute of limitations prior to the making of actual demand for payment by the lawful holder thereof.

ID.—CONSTRUCTION OF NOTE—MEANING OF WORDS—OBJECT AND CIRCUMSTANCES—STATUTE MADE PART OF IT.—Every word used in the note is to be given its full meaning and effect; and in ascertaining its meaning the object in view and the circumstances attending its execution are to be considered. The note having been given pursuant to the act under which the insurance company was organized, its provisions, in so far as they bear upon such note, must be considered as written into the note itself.

ID.—TIME OF DEMAND FIXED BY ACT—CONTINUING GUARANTEE FUND.—

The act of incorporation, which is equal in dignity with the statute of limitations, limits the time within which a demand may be made for the payment of a guarantee note to the period before a fixed capital is obtained by the company, it being intended that such notes shall constitute a continuing guarantee fund, which was to remain intact for the protection of policy-holders and other creditors of the company until a fixed capital should be acquired, when the guarantee notes were to be surrendered.

ID.—NOTES PAYABLE AT OPTION OF COMPANY—EXCLUSION OF PRESUMED

DEMAND.—Since the Insurance Act required the notes to be payable at the option of the company, and to be negotiable, it was proper, and in accordance with the intent of the act, that the notes should negative any presumption of a demand against the company or its indorsee by making each payable only after an actual demand.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. M. C. Sloss, Judge.

The facts are stated in the opinion of the court.

Vincent Neale, for Appellant.

Bishop, Wheeler & Hoefler, and William Rix, for Respondent.

LORIGAN, J.—This is an appeal from a judgment entered in favor of defendant after an order sustaining a demurrer to the complaint was entered.

The action is founded on a promissory note made by A. E. Head, against whom the action was originally commenced, but who having thereafter died, the respondent, as his administrator, was substituted as defendant.

It appears from the allegations of the complaint, necessary to be stated in order to discuss the point involved on this ap-

operated together to provide means to wind up said insurance company and liquidate its indebtedness; that said note of said Head was under direction of said syndicate transferred to the executors of the estate of one James Laidley, deceased, in settlement and extinguishment of a claim of eight thousand four hundred dollars against the said insolvent corporation by the estate of said Laidley arising out of a policy of ten thousand dollars issued by said insurance company payable on the death of said Laidley; that on the twenty-second day of September, 1888, payment of said note was actually demanded of said Head by the executors of said estate, and upon his refusal to pay this action was commenced September 28, 1888, and is now being prosecuted in behalf of said estate.

The defendant demurred to the complaint on the ground that the cause of action of said note was barred by the statute of limitations. The demurrer was sustained by the superior court, and the validity of said order is the only point presented on this appeal from the judgment.

This case was here on appeal before—*Neale v. Head*, 133 Cal. 42, [65 Pac. 131, 576]—after trial and judgment for the plaintiff. On that appeal it was urged, among other grounds for reversal, that the claim upon said note was barred by the statute of limitations, but the case being reversed on other grounds no disposition of that point was made. It is claimed by respondent in support of the ruling of the lower court that the general rule is, where a demand is necessary to perfect a right of action upon a promissory note payable on demand, and to set the statute of limitations in motion, that such demand must be made within a reasonable time, which in no event can exceed the statute of limitations provided for bringing said action after the cause of action has accrued, and that if such demand is delayed beyond that period the right of action is forever barred. And applying the rule to the note at bar, it is insisted that as such note provided for payment "after demand" such demand should have been made within the four-year period of limitation, and not having been so made the cause of action upon the note was barred when the complaint in this action was filed sixteen years after the latest period for making such demand existed. Conceding this to be the general rule, it has only been applied in cases where the notes in question have been made payable

at a given period "after demand." We have been pointed to no authority which has held that this rule is applicable to notes payable within a certain period "after actual demand." In fact, our attention has not been directed to any case where the language used in the note before us has ever come up for consideration or interpretation. The general rule of limitations asserted by respondent as applicable to the note at bar is formulated by the decisions supporting it in cases where a note is payable so many days "after demand," upon a presumption from lapse of time that a demand was made. But certainly as a matter of simple contract the maker of a note could contract so that the maturity of his note payable so many days after demand should not be determined by presumption of law that a demand was made, but that it should only mature after actual demand—a demand in fact as contradistinguished from a presumptive one. And that this was the intention of the parties we think is apparent not only from the language used in the note, but from the situation of the contracting parties and the circumstances attending its making and delivery. It is a cardinal rule that in the interpretation of a contract every word used therein is to be given its full meaning and effect. And in the construction of a written instrument, in order to ascertain what was meant by the language used, the object in view and the circumstances surrounding the execution of the instrument are properly to be taken into consideration for that purpose.

Now, considering the situation and circumstances under which this note was executed. It was one of a number required to be given to the California Mutual Life Insurance Company in order to constitute a guarantee fund as required by the act under which the company was organized. It was given pursuant to the terms of the act, and the provisions of the act, in as far as they bear upon such note, must be considered as written into the note itself. (*Neale v. Head*, 133 Cal. 43-45, [65 Pac. 131, 576].)

Referring now to such provisions.

The act provided that every company formed under it should have a capital stock of not less than one hundred thousand dollars, was prohibited from making any insurance until said amount was fully paid up in cash, and until

after it should have obtained a fund to be known as the guarantee fund of not less than two hundred and fifty thousand dollars, consisting of the promissory notes of solvent persons approved by its board of directors and by each other note-giver; no note of any one person to exceed five thousand dollars.

Such notes were payable to the company, or its order, and at such time or times, in such modes and in such sums, and with or without interest, as the board of directors should prescribe. Such notes were to be payable absolutely, and at all events at the company's option, were negotiable and might be indorsed and transferred and converted into cash, or otherwise dealt with by the company at its discretion, without reference to any contingency of losses, expense, or otherwise. It was provided that such notes, or the proceeds thereof, should remain with the company as a fund for the better security of its dealers, should be assets of the company liable for all its debts, obligations, and indebtedness next after its assets from premiums and other sources, exclusive of capital stock, until the net earnings of the company, over and above its expenses, losses, and liabilities, should have accumulated, in cash or securities in which the net earnings had been invested, to a sum which, with the capital stock, would be equal to the original amounts of the guarantee fund and of the capital stock, and that thereupon the said sum of the capital stock should become and remain the fixed capital of the company, etc. It was further provided that when this fixed capital was attained all notes of the fund remaining in the company's control should be surrendered to the makers thereof, respectively, or other parties entitled to receive the same, but that until such time no guarantee note should be withdrawn from the fund unless another note of equal solvency should be substituted therefor, and not then unless with the unanimous approval of the board of directors then in office, and of all the other parties liable on the rest of the notes comprising the guarantee fund. It was also provided that the company should allow a commission of five per cent per annum on all such guarantee notes while outstanding, and also interest on all moneys paid on such notes by the parties liable thereon at the rate of twelve per cent per annum until repaid by the company.

As we say, it was under the provisions of this act, and for the purpose of assisting in creating the guarantee fund thereby required, that the note in controversy was given.

Now, we think it clear, when these provisions of the act are carefully considered, that if we assume, as is contended by counsel for respondent that the language of the note making it payable "after actual demand" is of no more legal force than if it had read simply "after demand," still, even so construing the note, the act itself provides within what time such demand may be exercised, which is at any time prior to the acquisition by the company of a fixed capital. This act is of equal dignity with the general statute of limitations. The legislature could have expressly provided that the time within which demand might be made on such guarantee notes might be at any time between the date of their execution and before a fixed capital was obtained by the company. It will not be pretended that in the face of such a provision in the act the statute of limitations which would ordinarily apply to notes payable at a given time "after demand" would apply to a note so payable given under the provisions of the act in question. But while the act contains no direct provision such as we have suggested might have been inserted in it, still it is obvious, when we consider the general scope and purpose of requiring these notes and the provisions relative to them, that this was what was contemplated and intended by providing that these guarantee notes should be payable at the option of the company. Under the act it was intended that these notes should constitute a continuing guarantee fund, which should remain intact for the protection of the policy-holders and other creditors of the company until a fixed capital was acquired, when the makers were to be relieved from responsibility and the notes surrendered. Until that time it was intended that the fund as represented by these notes (unless at the option of the company previous payment on them should be required) should constitute an inviolable fund to be resorted to when necessary to pay any claims payment of which they were executed to secure. There is nothing in the statute requiring the company to sue upon them every four years, nor any provision requiring that they should be renewed within that period. Under the act no duty is imposed upon the company to have them renewed—

replaced by new notes. On the contrary, as indicating that the original notes, as far as any acts of the company are concerned, shall at its option remain in the fund and under the control of the company, it is expressly provided that until a fixed capital is acquired no guarantee note shall be withdrawn from such fund unless another note of equal solvency shall be substituted therefor, and not then unless by unanimous approval of the board of directors and all the other parties liable on the rest of the notes in the fund. This provision evidently was intended to apply in cases where a guarantor of the fund desired to substitute another guarantor in his place, and is the only way provided in which release, prior to the acquirement of a fixed capital, could be obtained by any guarantor from his continuing guarantee. In this regard it may be suggested, too, that as the purpose to be attained by requiring these guaranteed notes to be made was to protect the policy-holders and other creditors until the fixed capital was attained, this protection could be best afforded by providing that the notes should be a continuing guarantee until that time, rather than to require them to be renewed or sued on every four years, matters which the directors of the company might, to the injury of the fund, neglect to do. Neither could anything be attained by suing upon these notes every four years. All that could be accomplished would be to convert good securities into cash, and thereby substitute a guarantee cash fund for a guarantee-note one. And this to the disadvantage of the company, because while it was paying but five per cent commission per annum on the notes under the act it would be paying under the same act twelve per cent interest to the makers of them on the money collected, and might so have to do for possibly many years before the guarantee fund would be required for any purpose, if it would be required at all. The act certainly contemplated nothing of this kind. In fact it contemplated that this guarantee-note fund might never be called on, and that it would ultimately be relieved by the attainment of a fixed capital, at which time the notes themselves would be surrendered. When a fixed capital which would relieve these notes could be attained would necessarily be problematical. It might be accomplished in a few years, or it might take many years to do so, or it might not be achieved at all. It might also

take many years before any necessity would arise for calling on the guarantee fund at all. The liability of the company, considering the nature of its business, would principally be for death losses, any great number of which could not reasonably be anticipated for many years subsequent to the execution of these notes, or such as did occur might be paid from other resources of the company without calling on the guarantee-note fund. In contemplation of the uncertainty as to the time when this guarantee fund might be required, if at all, as it was to be created for the benefit mainly of policyholders whose claims might not accrue for many years, it was intended by the act that these guarantee notes should constitute a continuing guarantee fund, such notes to be payable at the option of the company, to be exercised at any time prior to the establishment of a fixed capital provided for in the act.

As these notes must be construed in the light of these provisions, it follows, as the act conferred upon the company the option of demanding payment of them at any time before a fixed capital was required, that when the note in question was executed providing for payment after demand, it was intended by the parties that such demand might be exercised by the company at any time prior to the acquirement of a fixed capital. The terms used in the note were inserted in harmony with the provisions of the act, so that the option there given to the company might be exercised at its pleasure at any time prior to that event.

In this regard the act, as the legislature had a right to provide, furnished its own provision when the statute of limitations should commence to run against these guarantee notes, which was after demand for payment made prior to obtaining such capital. Until such demand the statute of limitations could not operate.

Under this view, as the company had not acquired a fixed capital when demand was made on the note at bar, the statute of limitations had not run when this action was commenced.

Aside, however, from a consideration of the terms of the note, under the provisions of the act requiring its execution and declaring the purpose and effect thereof, we are satisfied that under the rule for interpreting contracts, which requires full force and effect to be given to every word used therein

with a view of determining the meaning and intention of the parties, the statute of limitations would not commence to run until demand in fact—an actual demand—was made for payment of the note.

It is claimed by respondent that the word "demand" implies itself an actual demand, and hence the word "actual" may be treated as redundant. Under this contention the word "actual" would have no meaning. It was, however, used by the parties, and we think sufficient reason is apparent why it was used, and used deliberately. It was used not only as characterizing the nature of the demand for payment which should be made, but as determining the time within which interest should begin to run upon the note, because it is provided therein that "five days after actual demand" the principal sum shall be paid, "with interest at the then legal rate from and after such demand." And it is readily perceivable why actual demand was provided for. The Insurance Act required these notes to be payable at the option of the company. It was further provided that these notes might be negotiated by the company; that it might indorse or discount them at any time that it saw fit to do so. When the form of notes to be given under the act was under consideration by the board of directors, it was doubtless then well understood that when a note was made payable simply "on demand" no demand need be made at all, and that the statute of limitations commenced to run from the date of the note; likewise that though a demand was necessary to protect a right of action on a note payable so many days "after demand," yet in order to bind an indorser of such note such demand must be made within a reasonable time; they knew also that as to the payee in such a note the rule contended for here by respondent would apply,—namely, that from the lapse of a reasonable time a demand would be presumed, such reasonable time usually being determined by the analogy of the statute of limitations.

With the knowledge of the law as applied to these forms of notes, the corporation doubtless wished to avoid its application by providing a different form. With this end in view the word "actual" was used. By using it both the maker and the payee intended that neither the rule that a note payable "on demand" was payable immediately, nor that to

bind an indorser on a note payable after demand the demand should be made within a reasonable time, should apply as to these notes. As the Insurance Act provided that these notes should be negotiable, it was intended to secure the freest negotiability at any time the company might desire to negotiate them. It was contemplated that at any time before a fixed capital was achieved they might be readily convertible into money. This ready negotiability could be best attained by making the notes payable at a given period after "actual demand," because as an indorser the company would then be liable to the holder until he chose to make actual demand for payment, without any question possibly arising as to whether the demand was or was not made within a reasonable time.

It was also intended by this form of note, requiring "actual demand," to prevent as to the payee the indulgence of any presumption of demand from lapse of time. In effect, by the use of the word "actual," as distinguished from the word "presumed," it was intended by the parties as to these notes that no presumption of demand having been made on it should be indulged in; that it was to be continuing security which would be unaffected by mere lapse of time before actual demand, and that it should not mature until actual demand for payment of it was made. Under these views the demand made for the payment of this note was in time, the statute of limitations was no bar to the action commenced on it, and the demurrer should have been overruled.

The judgment is reversed, with directions to the lower court to overrule the demurrer and allow the defendant to answer.

Henshaw, J., and McFarland, J., concurred.

[S. F. No. 4654. In Bank.—February 5, 1907.]

ELIZA SHIPMAN et al., Petitioners, v. E. P. UNANGST,
Judge of the Superior Court, etc., Respondent.

ESTATES OF DECEASED PERSONS—ORDER SETTING APART HOMESTEAD—
FAMILY ALLOWANCE—NEW TRIAL.—A motion for a new trial is not
a proper procedure for the reconsideration of orders setting apart
a homestead and exempt property to a widow, and awarding her a
family allowance, as it is the duty of the court *ex parte* and without
petition to make such orders.

ID.—BILL OF EXCEPTIONS—APPEAL FROM ORDER.—A bill of exceptions,
presented to be used on such a motion, cannot be settled as a bill
to be used on appeal from such orders when it was presented too
late for such purpose.

APPLICATION for a Writ of Mandate directed to the
Judge of the Superior Court of San Luis Obispo County.
E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

S. V. Wright, for Petitioners.

W. M. Shipsey, for Respondent.

HENSHAW, J.—In the course of the probate proceedings
in the matter of the estate of Patrick Moore, deceased, the
court made its order setting apart a homestead to the widow,
with certain property as exempt from execution, and also
awarded her a family allowance, all in accordance with sec-
tions 1465 and 1466 of the Code of Civil Procedure. Sub-
sequently petitioners herein gave notice of intention to move
for a new trial, and moved therefor, presenting for settle-
ment a bill of exceptions to be used on said motion. The
court refused to settle the bill and petitioners applied for
mandate. In *Leach v. Pierce*, 93 Cal. 614, [29 Pac. 235], this
identical question came before the court, and it was there
decided that a motion for a new trial was not a proper pro-
cedure after an order for a family allowance had been made;
that it is the duty of the court *ex parte* and without petition to

make such orders. What is there said is decisive of the question under this application.

It is, however, urged by petitioners that the bill should be settled as a bill of exceptions to be used upon their appeal from the order. If the circumstances permitted, this court would so hold, as was done in *Leach v. Pierce*, 93 Cal. 614, [29 Pac. 235]. But, treating the proposed bill of exceptions in this case as a bill of exceptions to be used on appeal from the order, its presentation was entirely too late.

The application for mandate is therefore denied.

Angellotti, J., McFarland, J., Sloss, J., Shaw, J., and Lorigan, J., concurred.

Rehearing denied.

[S. F. No. 3665. Department Two.—February 6, 1907.]

MARK CALKINS, Respondent, v. SOROSIS FRUIT COMPANY, Appellant.

WATER-RIGHTS—CONVEYANCE OF LAND—APPURTENANT RIGHT—SUBSEQUENT DIVISION AND AGREEMENT—RIGHT TO DISPOSE OF SURPLUS WATER.—Where the owner of a farm having a water-right, for the purpose of irrigating the farm and disposing of the surplus water to other farms, sold and conveyed a part of the farm and a proportionate share of the water-right, with the right to convey the water across lands of the grantor to the lands of the grantee, and they subsequently divided the water by agreement, by means of flumes, so as to give an increased flow to the grantee, by the terms of which agreement they agreed to convey to each other the right to receive and use all the water that might flow in their respective flumes and ditches, and to share the proportionate expense of the main ditch to the point of diversion, and that the grantee's right should be appurtenant to his lands, as a part thereof, and for the benefit of said lands,—the grantee has the right to dispose of the use of any surplus water flowing through his flume and ditch to owners of adjoining lands when not needed for full use on his own land.

ID.—CONSTRUCTION OF AGREEMENT—"APPURTENANT"—"BENEFIT OF LAND."—The effect of the agreement making the water-right of the grantee "appurtenant to his lands," and "for the benefit of said lands," merely embodies the legal definition of an "appurtenance" to land given in section 662 of the Civil Code, making a

thing "appurtenant to land when it is by right used with the land for its benefit," and the expression "for the benefit of said lands" merely couples with the word "appurtenant" its legal definition.

ID.—COVENANT OF GRANTOR TO GRANTEE AND SUBSEQUENT OWNERS ONLY.

—A covenant binding the grantor to the grantee and all subsequent owners of the land, "but to no other person or persons," does not at all have the effect to limit the grantee's use of the waters secured to him to his own lands exclusively, but is merely intended to prevent a transfer of the whole body of the water-right to any third person apart from a sale of the land.

ID.—RIGHTS OF GRANTOR NOT INFRINGED—ACTION BY GRANTEE TO DETERMINE RIGHT TO USE OF SURPLUS WATER.

—No rights of the grantor were infringed by the disposition by the grantee of the surplus water flowing in his flume and ditch; and where the grantor has wrongfully interfered therewith, and claimed the right to sell all surplus water, the grantee may maintain an action to have his rights to dispose of the use of his own surplus water determined.

ID.—SPECIAL DAMAGES—INSUFFICIENT PROOF—LIMIT OF NEW TRIAL.

—The grantee has the right to recover special damages arising from the interference by the grantor with the grantee's right of disposition of surplus water, if clearly proved; but it is held that the proof is insufficient to show the amount of special damages awarded, and that a new trial must be granted on that issue only.

APPEAL from a judgment of the Superior Court of Santa Clara County. A. L. Rhodes, Judge.

The facts are stated in the opinion of the court.

W. P. Johnson, and E. E. Cothran, for Appellant.

Joseph H. Patton, for Respondent.

LORIGAN, J.—This appeal involves the question as to what extent plaintiff is entitled to control certain waters conveyed to him by defendant.

The record discloses the following facts: In October, 1893, defendant was the owner of a tract of land containing 247.37 acres, known as the "Sorosis Farm," bordering on the easterly side of Quito Creek, in Santa Clara County, and in that month built a dam across said creek and a diverting ditch upon its own lands, and thereby effectually diverted to its own lands, for the purpose of irrigating said "Sorosis

Farm," and also for the purpose of irrigating other lands in said county of Santa Clara owned by parties other than defendant, all the waters of said creek flowing therein ordinarily during all seasons of the year.

After such appropriation and diversion, and on July 22, 1896, defendant conveyed to plaintiff 40.37 acres of such "Sorosis Farm," and also the right to take from the said ditch of defendant, at the headgate thereof in said Quito Creek, so much of the water flowing therein to which defendant was entitled as should be represented by a fraction having for its numerator 40.37 and for its denominator 247.37 (about one sixth of said diverted water), together with the right to convey said water across lands of the defendant lying between the diverting ditch (which was on said land of defendant) and the lands conveyed to plaintiff.

Thereafter, and prior to January 16, 1902, the waters of said creek flowing in said ditch were applied to a beneficial use,—namely, the irrigation of the respective lands of the plaintiff and defendant, on which there were growing and bearing orchards,—and for the purpose of the irrigation of other orchard land, both riparian and non-riparian to said stream.

Immediately prior to January 16, 1902, plaintiff and defendant, in concert, built in said irrigation ditch a receiving-box and two certain flumes of uniform depth but of different width, one box being six feet in width, the other thirteen and a half inches, the larger one being known as defendant's flume, the smaller one as plaintiff's flume, the waters from the latter flume being conducted onto the lands of plaintiff by the ditch then existing across defendant's lands and mentioned in the deed of July 22, 1896. By the construction of the smaller flume plaintiff received in his ditch and conveyed to his land a somewhat larger quantity than he was entitled to under his deed—about one fifth of the water instead of one sixth. After the receiving-box and flumes had been constructed, and on January 16, 1902, plaintiff and defendant entered into a written agreement which recited that plaintiff had a right to a certain portion of the waters that flowed in said main irrigation ditch, and a right of way to carry the same across defendant's lands to the lands of plaintiff, and that for the purpose of dividing, apportioning, and

setting apart to each other their respective quantity of the volume of water which each was entitled to receive they had constructed and built in said irrigation ditch the receiving-box and flumes above referred to. By the agreement the parties immediately conveyed to each other the right to receive and use all the waters that might flow in their respective flumes, with the additional right conferred on plaintiff to convey said waters across said defendant's land to his own through the then existing ditch which he had theretofore been using. The agreement further provided for a payment by both parties of a proportionate amount of the expenses of permanently maintaining the main irrigation ditch from the dam to the point of diversion of its waters between the parties, with other provisions relative to said main irrigation ditch unnecessary to state. The agreement then proceeded with the following covenant: "That all the interest, rights, estate and privileges hereinabove described as passing or accruing to or vesting in the said party of the second part [plaintiff], shall be deemed and treated as, and appurtenant to and as a part and for the benefit of said lands of the party of the second part hereinabove described, and that the party of the first part [defendant] is bound by the terms of this instrument to all subsequent owners of said land of the party of the second part, as well as to the said party of the second part, but to no other person or persons."

From the execution of the agreement of January 16, 1902, to April 19, 1902, plaintiff received water from said smaller flume and conveyed it in the ditch across the land of defendant to his own lands. About the latter date, plaintiff finding that the water so conveyed to his lands was more than sufficient to irrigate them, and that there was a surplus of waters taken and received in his flume and ditch which he did not require until a later period during the irrigation season, sold and contracted to sell to his neighbors owning orchards below the land of plaintiff, the use of said surplus waters, for short periods of time and till he would again need them for irrigation, and constructed ditches for that purpose.

On said April 19, 1902, defendant, asserting that plaintiff could only use such waters on his own lands, and that when not so being used defendant was entitled to take and use them, dammed up plaintiff's flume and ditch and diverted from

plaintiff all the waters which should have flown to plaintiff's land therein, caused a portion thereof to be turned back into the Quito Creek, and diverted the remainder thereof for the purpose of selling the same to other persons.

Plaintiff thereupon commenced this action, praying, in effect, that it be adjudged that he had a right to sell and dispose of the surplus waters flowing or to flow from said main irrigating ditch through his flume and ditch upon his lands, and for special damages in the sum of four hundred and twenty dollars, sustained through the act of defendant in obstructing and diverting the flow of water through his flume and ditch and thereby preventing the sale by him thereof.

The court decided that since July 22, 1896, plaintiff had been and still is the owner of the water-rights, waters, and rights of way described in the deed of conveyance of that date, and on said January 16, 1902, was the owner of the waters, water-rights, and rights of way granted and conveyed to him by defendant by the agreement of that date; that plaintiff is entitled to use and appropriate said waters when conducted to his lands in such manner and for such purposes as he may deem proper, both in the irrigation of his land and selling the use thereof to others for the irrigation of their lands, and that plaintiff was specially damaged in the sum of four hundred and twenty dollars.

Judgment was accordingly entered for plaintiff, and from said judgment, accompanied by a bill of exceptions, this appeal is taken.

The main question in this case is to what extent plaintiff is entitled to control the waters taken to his land, over the lands of defendant from defendant's main irrigation ditch, under his conveyance from the latter.

Counsel have devoted much discussion to the terms of both the deed and agreement as bearing on this question. We see no reason, however, why any consideration of the deed need be had. The matter before us is not to what extent the plaintiff acquired a right to the waters conveyed by the deed or by the agreement, but whether the right which he was exercising, of selling the use of the surplus waters taken to his lands to his neighbors, was authorized under either. No question is involved here of a sale of the water-right which plaintiff acquired,—no question of a segregation of the right from the

land to which appellant claims it was an easement appurtenant, or any attempt to dispose of such right to others, to be used separate and apart from plaintiff's land and to his exclusion. What he has done, and what he claims the right to do, is to contract with his neighbors for the sale to them of the use of the surplus waters carried to his land, for limited periods of time. There was no sale made or attempted, and in effect what he was doing was to license the use of the waters to his neighbors for a rental during the period when he did not need them for the irrigation of his own land. If under the agreement this right was secured to him, it is immaterial whether it was also secured by the deed. And that it was secured by the agreement we think is not open to question.

Appellant's position is that the waters conveyed to the plaintiff's premises could be used only on the lands of the plaintiff and nowhere else; that the agreement did not convey the *corpus* of the waters, but merely an easement appurtenant, consisting of the right to the flow and use of them to irrigate his own land and no other. But upon inspection it will be seen that neither the covenant nor the agreement provides or says anything about using the waters on plaintiff's land for any purpose whatever, or at all. Plaintiff purchased a right to a given quantity of water to be received in his flume from the main irrigation ditch of defendant, and thence taken to his land. At the time of this agreement defendant had secured a prescriptive title to all of the waters of the Quito Creek, and as far as the parties to this agreement are concerned these waters were the private property of the defendant. (*Park C. and M. Co. v. Hoyt*, 57 Cal. 44.) Defendant had become as fully vested with the ownership in them as a person can be said to have acquired ownership in one of the natural elements, and the right which he conveyed to plaintiff was commensurate with the right which he had. Nor is there any merit in the claim that by the covenant in the agreement the water-right conveyed under it became an easement appurtenant to plaintiff's lands so that the use of the waters was limited exclusively to such land. No doubt by the covenant the water-right itself was made an easement appurtenant to the land. But we look in vain to the agreement or to this covenant to find anything limiting or restricting the use of the

water to the lands of plaintiff. It is not a case where by the very terms of the conveyance the right to use the water was expressly limited to lands to which the right was made appurtenant. Undoubtedly a grant of a water-right may restrict the use of the waters to particular lands for irrigation purposes, or for domestic uses, for the operation of a mill, or for the development of mechanical power, or for other specific and designated purposes, but no such restriction is found in either the agreement or this covenant. In fact, when we examine the covenant it is observed that what it was intended to effect, and did effect, was to make the water-right granted an easement appurtenant to the land and nothing more. It was not intended to, nor did it, create a limitation upon the use of the waters which plaintiff had purchased. The covenant, in as far as it applies to "rights" mentioned in it which were vested in the plaintiff, had relation only to the water-right, and made it "appurtenant to and as a part and for the benefit of said lands of the party of the first part." The effect of this language was simply to make the water-right an easement appurtenant to the lands which were already owned by the plaintiff. The term "for the benefit of said lands," used in connection with the word "appurtenant," did not limit or restrict, as is contended for by appellant, the use of the waters to the land of plaintiff in addition to making the water-right appurtenant to it. As defined by the code, a thing is "appurtenant to land when it is by right used with the land for its benefit." (Civ. Code, sec. 662.) And it is obvious that in using the terms in the covenant declaring that the water-right "shall . . . be deemed appurtenant to . . . and for the benefit of said lands," nothing more was meant by the expression "and for the benefit of said lands" than to couple with the word "appurtenant" its legal definition.

Nor does the further provision in the covenant binding the appellant, with reference to the water-rights conveyed, solely "to all subsequent owners of said land . . . and to the said party of the second part [plaintiff] but to no other person or persons" at all limit the use of the waters purchased by plaintiff to his own lands. Under the deed the grant of the water-right to plaintiff was not expressly made appurtenant to the land. As it was possible, therefore, that some question might arise as to whether the plaintiff might not have the

right to segregate the water-right conveyed by the deed and sell it independent of his land, providing that no different or additional burden was imposed upon the servitude than then existed, and no substantial alteration in the mode of using the easement resulted, it was intended by the subsequent agreement to avoid all question on that score. This was accomplished by in terms declaring in the covenant that the water-right should be not only appurtenant, but that it could not be conveyed unless by a conveyance of the land itself, and this was all that it was intended to accomplish. As the covenant relied on did not limit or restrain plaintiff as to the use of the water conveyed to him, and there is nothing anywhere else in the agreement which pretends to do so, we are satisfied that plaintiff had a legal right to temporarily dispose of the use of the water conveyed to his property as he saw fit, when he did not need it for his own use. As we have before said, the plaintiff has not and is not attempting to dispose of any water-right, but solely of the use for a limited period by his neighbors for irrigation purposes of waters which he owned, and to the entire use of which he was entitled, but which he then had no necessity to use. In so doing we do not see how he invaded any right of defendant, or what concern the latter has in the matter. Plaintiff is not wasting the water or applying it to other than a beneficial use. By the agreement plaintiff became entitled to one fifth in quantity of the waters of the main irrigation ditch, with a right to carry them to his own land. It is not pretended that he is taking out of the main irrigation ditch any greater quantity than he purchased, whether he used it on his own land or only used part of it there and disposed of the surplus. Appellant's position seems to be that because plaintiff does not need upon his own land all that he purchased and carried there, that it is entitled to the surplus or residuum, but as the sale to plaintiff was of a specified quantity of water, if any such right is available to defendant it must have been reserved in the agreement of conveyance, and we have seen that there was no such reservation. The grant to plaintiff of this water was not restrained by any limitations or conditions whatever. The right to the waters—the right to use them for beneficial purposes—was vested in plaintiff as a property right, and when the waters were conducted to his land and

under his control he had the right as incident to his ownership of them to make such disposition of their use as he saw fit, limited, of course, to a beneficial use of them. As he had purchased the right to the use of all the waters conveyed from the irrigation ditch, he was entitled to an unrestricted control over that use. He was not limited by any contract with defendant upon the subject. He is not taking any more water than he purchased, and is not using himself or licensing to his neighbors more than he bought. Having purchased the use of a given quantity, if he cannot use it all himself, we see no reason why he cannot sell the right to a temporary use of it to his neighbors, as wanted, for a beneficial purpose. To hold that he cannot do so would be to impose a restriction for which no warrant is found in the agreement of purchase, and would be in effect to deprive him of a valuable incident to the ownership of this character of property, the right to dispose of its use to others when it is not required for use by the owner himself. There is no law which will impose the limitation contended for by appellant. As there is, then, nothing in the terms of the agreement or the covenant relied on limiting the use of the waters purchased by plaintiff to his own lands, or any rule of law that we are advised of so restricting him from disposing of such use, the conclusion reached by the lower court that plaintiff had a right to make such disposal of the waters purchased by him was correct.

As to the only other point in the case, the award of special damages. Appellant insists that the finding upon which the judgment therefor is based is not supported by the evidence. The evidence upon this subject is very meager, and consists of that of the plaintiff. He testified that between January 16, 1902, and April 19th of the same year, he was selling, or had contracted to sell, the waters to be used on his neighbors' lands; that under the contracts therefor he had negotiated for twenty-one days' sale of water at twenty dollars per day; and that the flume of plaintiff was obstructed by defendant on April 19, 1902. On this evidence the court made its finding of special damages in the sum of four hundred and twenty dollars. This finding is not sustained by the evidence. It was necessary in support of the claim for special damages that clear proof of them be made. All that the evidence shows is that plaintiff was selling water under contracts for twenty-

one days' use between January 16th and April 19, 1902. It does not appear when any of the contracts were made, or at what time the supply of water was to be furnished, or whether any of it had been furnished during the above dates. As the obstruction was not placed in the flume until April 19th, it does not appear how many days' use was had under the contracts between January 16, 1902, and the damming of plaintiff's flume, or whether the contracts were for the supply of water before April 19th or after. It cannot be said that there is any evidence of a definite character upon the subject of special damages.

The judgment, therefore, is reversed as to that portion of it which awards special damages, and a new trial is ordered to be had solely upon the issue of special damages. As to all the rest of the judgment, it is affirmed. Appellant is entitled to its costs on appeal.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 3607. In Bank.—February 6, 1907.]

E. H. RIXFORD (Substituted for F. G. Halsey), Respondent, v. **ROBERT E. ZEIGLER**, Respondent, and **GEORGE M. PERINE**, Appellant.

DEEDS—GRANTEE—UNINCORPORATED "CHURCH COMMUNITY"—POSSESSION AND USE NOT TAKEN—TITLE NOT PASSED—DEED UNDER EXECUTION AGAINST GRANTOR.—A deed to an unincorporated "church community" for "school and church purposes," not naming its members or any other grantee, under which it appears that no possession was taken or use had of the property conveyed for any purpose by the "church community" or its members, or by any one claiming to act for it, and that no claim thereto has been asserted by or for its members, passed no title, legal or equitable, from the grantor, and a sheriff's deed under execution against him passed the title as against his subsequent grantee.

ID.—GENERAL RULE APPLICABLE—GRANTEE MUST BE CAPABLE TO TAKE.—In such case the general rule applies that to make a deed effective the grantee must be a person either natural or artificial, capable of taking the property conveyed, and that a deed is void unless the grantee named has such capability.

1D.—EXCEPTION AS TO GRANT FOR CHARITABLE PURPOSES INAPPLICABLE—
RULE IN EQUITY.—The exception to the general rule that where a grant for charitable purposes is sought to be enforced by beneficiaries, who have taken possession of the property granted, and have continuously used the same for such purposes, equity will devise plans for carrying it out, has no application to the facts of the present case.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Seawell, Judge.

The facts are stated in the opinion of the court.

D. H. Whittemore, for Appellant.

E. H. Rixford, and J. A. Fairweather, for Respondent.

McFARLAND, J.—This action was brought by the original plaintiff, F. G. Halsey, for the partition of a certain piece of land. It was averred in the complaint that Halsey and defendant Zeigler were the owners in fee of the land as tenants in common; and the other defendants were made parties, as claiming some interest in the property. Zeigler answered, admitting and averring that plaintiff and himself were owners of the land in contest as tenants in common, and united in plaintiff's prayer for partition. Defendant Perine answered, denying that plaintiff and Zeigler were the owners of the land, and averring that he, Perine, was the sole owner thereof. The other defendants made default. The court found that plaintiff and defendant Zeigler were the owners of the property, that Perine had no interest therein, and rendered an interlocutory judgment for a partition as prayed for in the complaint. From this judgment defendant Perine appeals.

The material facts are these: On July 8, 1864, one B. C. Vandall recovered judgment in the district court in and for the city and county of San Francisco against Harvey S. Brown for \$1,759.26, with interests and costs. On July 23, 1864, an execution was issued under said judgment, and was levied upon the land in contest in the case at bar as the property of said Brown; and by virtue of said execution the property was sold by the sheriff to said Vandall, and on June 7, 1865, the sheriff executed a deed to Vandall conveying to the latter all the title which Brown had in the land at the date of said judgment. Afterwards, and before the commencement

of this suit, whatever title Brown had in the land at the time of the execution sale, etc., vested by mesne conveyances in the plaintiff Halsey and the defendant Zeigler.

Brown was admittedly the owner of the land at the time of the suit by Vandall, the execution sale, etc., unless before that, on the 22d of December, 1862, he parted with the title by an instrument in writing which he that day executed. This instrument purported to be a deed conveying the land in contest here to "the community styling itself the German Roman Catholic St. Bonifazius Church Community." This instrument contains the following provision: "This conveyance is upon express condition that said property is to be used by said community for school and church purposes and for no other purpose whatever, nor shall said community sell or transfer the same or any part thereof, but the same shall be and remain the property of said community as long as they shall make use of said property for above purposes; but if they sell or transfer the same, or use it for any other purposes than those above mentioned, they shall forfeit all rights under this conveyance, and the said property shall revert to the first party and his heirs." It is found by the court upon sufficient evidence that at the time of the execution of said instrument the said church community was and still is an unincorporated association of persons associated together for the purpose of religious worship. It was not a corporation either *de jure* or *de facto*; it never pretended to act as a corporation. In the instrument no individual person was named as a grantee, nor was there any statement as to who constituted said church community. Neither the said community nor any of its members, nor any person claiming to act for it, ever took possession or used the said property for school or church purposes, or for any other purpose whatever, and never undertook to make any use whatever of the properties named in said instrument. In the case at bar all persons who are members of said community were made defendants, and they all made default.

Under these facts we are of opinion that no title ever passed out of Brown to any persons whatever by said instrument. The general rule is, beyond doubt, that a deed of conveyance is void unless the grantee named is capable of taking and holding the property named in the deed; and the general rule also is that to make a deed effective the grantee must be a person,

either natural or artificial, capable of taking and holding the property. In *Wiseman v. McNulty*, 25 Cal. 230, a deed had been made to the "Hibernia Company," and it was held void, the court saying: "The company does not appear to be a corporation nor even a partnership, holding the claims as partnership property, but simply a voluntary association not formed by articles in writing and without legal existence—a body unknown to the law. As such, the company would be incapable of taking and holding mining claims, by grant, or by any other means, by which title to real estate would pass." In *Winter v. Stock*, 29 Cal. 408, [89 Am. Dec. 57], the court approves a decision in the case of *Arthur v. Weston and Strode*, 22 Mo. 378. In that case it appeared that lands had been conveyed to "W. W. Phelps & Co." At the trial Arthur offered to prove that when the conveyance was made to Phelps & Co. said firm was composed of Phelps, Cowdry, and Whitmore, but the court rejected the offered evidence, holding the law to be that "the deed to W. W. Phelps & Co. operated to vest the legal title in W. W. Phelps alone, and that the entire title passed by the sheriff's deed under the execution sale, and gave judgment accordingly." Upon writ of error the supreme court sustained the decision of the court below, holding that the deed to W. W. Phelps & Co. did not take effect as a legal conveyance of the premises to Phelps, Cowdry, and Whitmore jointly, but that it operated to convey the property to Phelps alone. The court observed that the question "is not merely whether the grantor intended to convey to the persons composing the firm, but whether the partnership style is, as a matter of law, a good name of purchase in a conveyance of real property sufficient to pass the legal title to all the individuals of the firm. . . . A conveyance of real property being required by the statute to be put in writing, the party who is to take as grantee must be sufficiently ascertained by the written instrument, or it is a nullity, so far as it purports to effect a transfer of the legal title." (See, also, *Sunol v. Hepburn*, 1 Cal. 254; *Phelan v. San Francisco*, 6 Cal. 531.) In *Encyclopedia of Law and Procedure* (vol. 13, p. 624) it is said: "If the firm name is given and it consists of the surnames of the several parties it will vest the legal title in them, and generally if members of a partnership are designated with sufficient certainty under a firm name they will take, but a general

or an abbreviated term such as 'Company,' 'Co.' or 'Bro.' is held to be insufficient." The foregoing is undoubtedly the general rule; and there is nothing in the case at bar which brings it within any of the exceptions to that rule. The cases cited by appellant are where property had been granted for charitable purposes and had been taken possession of and continuously used for those purposes by persons claiming to be intended by a deed which merely uses the general name of the association; and in such cases courts of equity have devised plans for carrying out the intended charity; and they were cases where the persons claiming to be the beneficiaries under the deed were parties to the action asserting their rights. But nothing of the kind occurred in the case at bar. The persons who are members of the church community have never asserted any right under the deed, and from 1862, the date of the deed, to the present time, have never set up any claim under it. It is therefore our opinion that no title whatever passed from Brown to the said church community; that the title to the property was in Brown at the time of the sale under the Vandall judgment; and that such title was in the respondent at the time of the commencement of this action and when the judgment was rendered.

The appellant, Perine, claims title through a deed made by said Brown to one Spring, executed January 12, 1867. Whatever title Spring got from Brown went by mesne conveyances to one Gendotti, and afterwards Perine brought suit to foreclose a street assessment on the land in question, in which Gendotti was made defendant, and after a judgment in that case in favor of Perine the sheriff made a deed under the decree to Perine. In that case Perine also made the "church community" by that general name a party, but did not make any one of the members of that community a party. Of course, if, as appellant contends, Brown's deed to the church community carried the title, he had nothing left to convey to Spring, and if Brown's deed did not convey the title to the church community, then his title passed under the Vandall judgment, which was prior to his deed to Spring. But it is sufficient to say that the judgment in the assessment case is of no value as against the respondents herein, who are the real owners of the property, and were not made parties to that suit.

The foregoing views make it unnecessary to notice other points made by respondents.

The interlocutory judgment appealed from is affirmed.

Sloss, J., Shaw, J., Henshaw, J., Lorigan, J., and Beatty, C. J., concurred.

[S. F. No. 3498. In Bank.—February 6, 1907.]

CHARLES H. MACKINTOSH, Appellant, v. AGRICULTURAL FIRE INSURANCE COMPANY, Respondent.

FIRE INSURANCE—CHANGE OF INTEREST—OPTION TO PURCHASE NOT EXERCISED.—A mere option given to a third party to purchase which is not exercised by payment of the purchase money does not create a change of interest in the property insured against fire within the meaning of the fire-insurance policy, avoiding it for a change of interest.

ID.—CONSTRUCTION OF POLICY—LOSS AND RISK NOT CHANGED.—The change of interest referred to in the policy, in view of the well-known rule of construction, that policies are to be construed most strongly against the insurer, refers to some change of interest, which would make the loss in case of destruction fall upon the buyer, and cause the insurer to lose his interest in protecting the property from fire, and not as referring to a mere option to purchase, which does not change the risk in case of loss.

ID.—QUALIFIED POSSESSION TO TEST PROPERTY INSURED—CHANGE NOT EFFECTED—COMMON POSSESSION.—Where the person holding the option to purchase mining property insured had only a qualified possession, for the purpose of operating a smelter thereon to test slag and ore, under an agreement that during such testing the insured giver of the option or his agent "shall have full access to said property and its management, in every respect the same as though to all intents and purposes the work was being done by him," and it appears that the insured kept a watchman on the premises, who was holding for him, such common possession did not work the change of possession which would avoid the policy.

ID.—INCREASED HAZARD—SMELTING FURNACE—PERMISSION BY GENERAL AGENTS—INCREASED PREMIUM—INSUFFICIENT INDORSEMENT—WAIVER—ESTOPPEL.—Where an increased hazard from a smelting furnace was permitted by the general agents of the insurance company, with full knowledge of the facts, for an increased premium, who agreed to indorse the same upon the policy, but made an insufficient indorsement, owing to an erroneous description of the smelter as being in the policy, the case must be considered as

if the agreement was not indorsed upon the policy under the law as to waiver and estoppel created by the conduct of general agents authorized to make contracts.

ID.—STIPULATION AGAINST WAIVER OR PERMISSION NOT INDORSED—
WAIVER BY CONDUCT.—Stipulations in a policy against waiver or permission not indorsed do not preclude a waiver by the conduct of authorized agents in regard to future operations of the company, nor prevent the insured from relying on an oral contract by such agents to make an indorsement not effectively made.

ID.—FAILURE TO DESCRIBE SMELTER IN INDORSEMENT—ESTOPPEL.—The failure of the general agents of the company to accurately describe the smelter in the slip attached to the policy setting forth the permission for the additional premium, was the fault of the company, and any attempt on its part to avoid the policy because of such failure would at once create an estoppel which would prevent the company from taking advantage of it.

ID.—POWER OF GENERAL AGENTS TO WAIVE FORFEITURES—ORAL WAIVER CONSTITUTING NEW CONTRACT.—General agents authorized to issue and deliver new policies are regarded as having the same power to waive conditions and forfeitures as the companies themselves. The limitations embodied in the stipulation do not prevent them from making new contracts; and waivers constituting a new contract upon sufficient consideration need not be evidenced by writing nor indorsed upon the policy, if made by a general agent having power to make the contract, no matter what limitations or conditions may be expressed in the policy.

ID.—DUTY TO HAVE WATCHMAN—WORKS NOT IDLE—CUSTOMARY OPERATION—PRESUMPTION.—A clause in the policy making it the duty to keep a watchman day and night when the works are idle does not apply where the works are operated daily during usual and customary hours. There is no evidence that it was usual or customary to operate such works at night, and the presumption is to the contrary, and in the absence of such evidence on the part of the defendant it must be concluded that the policy did not require a watchman at night when the works were in operation during the day; and the fact that one was employed and failed to watch did not affect the validity of the policy.

ID.—FORFEITURE NOT FAVORED—SUBSTANTIAL OPERATION OF PART OF WORKS.—Forfeitures are not favored in law. It was not necessary that the whole works should be kept in operation or that all of the furnaces should be kept going every day. A substantial operation of the works is all that is required.

APPEAL from a judgment of the Superior Court of Alameda County. S. P. Hall, Judge.

The facts are stated in the opinion of the court.

Campbell, Metson & Campbell, G. W. Baker, and Thomas H. Breeze, for Appellant.

Goodfellow & Eells, for Respondent.

SHAW, J.—The action is upon a policy of insurance. The judgment was given for the defendant. The appeal was taken from the judgment within sixty days after its rendition, and the record is accompanied by a bill of exceptions.

The insurance company, in defense, alleged that there had been four several violations of the terms of the policy by the insured, without the consent of the company, and that the policy had been forfeited thereby, to wit: 1. That there had been a change of possession of the property; 2. That there had been a change of interest in the property insured; 3. That there had been an increase of hazard which was prohibited by the conditions of the policy; 4. That the property insured was idle and inoperative, and the insured had failed to keep a watchman constantly on duty, as the policy, in that event, required. The findings were in favor of the defendant on all these points. There was no substantial conflict in the evidence, and no serious dispute about the facts. The findings were manifestly based upon the court's conclusions as to the meaning and legal effect of the policy and the subsequent transactions of the parties. The decision of the case depends on the question whether or not the findings were justified by the evidence.

1. The first two defenses may be considered together. The change of interest and possession, if any, arose out of a proposed sale by the plaintiff to one G. W. Baker, after the issuance of the policy. A written agreement was executed between them, Mackintosh being the party of the first part and Baker being the party of the second part. It recited that the price of twenty-two thousand dollars for the property and certain slag and ore situated thereon had been agreed on, and that Baker was desirous of buying it at that price. It thereupon declared that he agreed that he would "purchase said premises and property" for said price, "in the following manner, that is to say:—

"It is agreed between the parties hereto that the said party of the first part shall execute to the said party of the second

part a good and sufficient deed of the premises above mentioned and described, together with a bill of sale of the slag and ore situated thereon, and place the same in escrow with A. M. McDonald to be delivered to the party of the second part upon the payment of the said sum of \$22,000 on or before sixty days from the date hereof.

"In case the said \$22,000 is not fully paid within sixty days from the date hereof as aforesaid, said premises shall be vacated by the Vulcan Smelting and Refining Company *and surrendered by the party of the second part free and clear of all encumbrances* of whatsoever kind or nature made or suffered by the said Vulcan Smelting and Refining Company, and shall also surrender to the party of the first part the product of all ores smelted or reduced in its furnace from said slag-dumps while occupying the same.

"It is further agreed between the parties hereto that, *during the time the party of the second part is in possession of said property, the said party of the first part or his agent A. M. McDonald shall have free access to said property and its management in every respect, the same as though to all intents and purposes the work was being done by him, instead of by the party of the second part,* and during the time said work is carried forward the said party of the second part shall in every way protect said property and premises from any encroachments or depredations or damage of any kind, and not endanger the said premises by fire, or from any other cause.

"The sum of \$400 is hereby acknowledged to have been received upon this contract by the party of the first part and the further sum of \$173 is to be paid to A. M. McDonald upon demand, which said sum, *in case of purchase, is to be credited as part of the purchase price, and in case of default is to be considered as rent of the premises during the occupation of the party of the second part,* as herein stated, and forfeited to the party of the first part.

"Time is of the essence of this contract.

"This contract shall not be assigned by the party of the second part until payment is made." (The italics are ours.)

Baker was acting in the premises as agent of the Vulcan Company. Prior to the execution of this agreement a previous agreement had been made between the same parties whereby Baker had obtained an option for sixty days for the purchase

of said premises and property. That time had expired and this agreement was made for the purpose of renewing the option. Under the previous agreement Baker had taken possession of the premises and put up thereon a small six-ton smelting furnace, which he had been operating, for the purpose of testing the slag and ore upon the premises, in order to be the better able to determine whether or not he desired to purchase the same at the price fixed. In pursuance of the agreement quoted above it was understood that Baker should remain in possession of the premises for the purpose of making such further test of said slag and ore as he might deem necessary to enable him to determine what he desired to do in regard to the purchase of the property. When the time expired Baker surrendered the property and refused to purchase.

Taking the circumstances thus surrounding the parties and the language of the contract together, we are of the opinion that it was not an absolute agreement on the part of Baker to purchase the property, but was simply an option whereby he had the privilege of purchasing the same at any time within the sixty days mentioned, by payment of the price as therein provided. There was therefore no change of interest in the premises by virtue of the contract. The title, interest, and estate in the property remained in Mackintosh, subject to be divested only by the payment of the money as provided in the contract. Upon failure to pay the money as provided therein, without any further act whatever on the part of Baker, the privilege to purchase, which he had obtained under the contract, ceased, and the property then remained free from any right in him whatever. All that he possessed prior to the payment of such purchase money was a mere right at his option to purchase or not. This right did not create an interest in him within the meaning of that term as used in the policy of insurance. The change of interest referred to in the policy, in view of the well-known rule of construction applied to insurance policies requiring them to be construed most strongly against the insurer, refers to some change of interest which would make the loss, in case of destruction, fall upon the buyer, so that by such change the original policy-holder would lose his interest in maintaining the property and protecting it from fire. It does not refer to a mere right which another party may acquire which does not change the risk in

case of loss, nor give the third party more than a mere option to purchase the property. This rule regarding the change of risk might be different if it were not for the qualified character of the possession which was given to Baker under the arrangement between the parties. Baker was to have possession of the property merely for the purpose of operating the smelter in order to test the slag and ore, and the seller, notwithstanding such possession, was to have "free access to said property and its management in every respect the same as though to all intents and purposes the work was being done by him" instead of by Baker. Under these circumstances, a loss by fire occurring before the exercise by Baker of his option would fall upon Mackintosh. If it was caused by the negligence of Baker, Mackintosh could recover from him the damage, both by reason of the express covenant in the contract and by the general principles of law requiring him to exercise ordinary care in the use of another's property. This emphasizes and illustrates the proposition that the loss would be caused by the destruction of the property of Mackintosh. If it were the property of Baker, Mackintosh would suffer no damage. The contract could not have been enforced by Mackintosh as a contract of sale and purchase. The terms of the policy required a change of interest in order to work a forfeiture. This contract cannot be construed to have passed any interest whatever in the property to Baker, but merely a prospective right to obtain an interest. The interest would pass when he exercised the option and not before.

The same considerations apply to the contention that there was a change of possession of the premises which Baker was holding under the owner, Mackintosh. He had no exclusive right to the property, and it further appeared that during the occupancy of Baker a watchman was kept on the property who was under the employment of and was holding for the seller, Mackintosh. Such common possession did not work the change of possession which would be required to avoid the policy. Furthermore, as will be hereafter seen, we think the conduct of the agents of the company was such as to waive any forfeiture on the ground of this particular change of possession.

2. The next defense is that there was an increase of hazard caused by the acts of the insured which, by the terms of the

policy, would cause its forfeiture. This increase of hazard arose from the erection upon the premises of a certain six-ton furnace by Mr. Baker, which was used by him for the purpose of testing the slag and ore upon the premises. This was erected some time in January, 1901, two months prior to the agreement above recited between Mackintosh and Baker. Before the erection of this smelting furnace, and before making the arrangement whereby Baker was to have possession of the works and operate the furnace for that purpose, the plaintiff's agent called upon the general agent of the defendant company and explained to him the circumstances and the proposed erection and operation of the furnace thereon for the purposes mentioned. The agent caused a rate to be fixed, and thereupon gave permission to erect said furnace and operate the same for sixty days, charging \$4.20 for the privilege. This permission expired upon the 16th of March following. The agreement above quoted was executed on that day, and thereupon the parties again called upon the general agent of the insurance company and explained their desire for a renewal of the permission and the purpose to continue the operation of this six-ton furnace for smelting the ore and slag on the premises. Thereupon the agent stated that it would be satisfactory to the company and gave the desired permission, again charging the additional sum of \$4.20 for the privilege of so doing, which sum was paid, and the policy delivered to the agent for the proper indorsement. The policy provides that "unless otherwise provided by agreement indorsed hereon or added hereto" the policy should be void if the hazard be increased, or if any change, other than by the death of the insured, takes place in the interest, title, or possession of the property. It further provides that "no officer, agent, or other representative of the company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions or conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The indorsement made

upon the policy by the general agent of the company was as follows: "In consideration of \$4.20 additional permission is hereby granted to operate the within described smelter for a period of forty-five days from this date. (Signed.) Edward Brown & Sons, General Agents." At the time this permission was given the six-ton smelter was on the premises, but it was not mentioned or described in the policy. The indorsement, therefore, did not, upon its face, give permission to operate the six-ton smelter, although doubtless it was so intended. We must consider the case upon the theory that no sufficient indorsement was made of the permission agreed upon and paid for. It is apparent from all the evidence that the parties all acted on the belief that the indorsement gave them permission to operate the six-ton smelter without invalidating the policy, and that the general agents of the company knew they so believed. It will be perceived that the general agent of the company was made fully acquainted with the increase of hazard and the change of occupation or possession contemplated by the parties, and that he agreed that the same might be done, and undertook to attach to the policy the required written permission for the contemplated changes. It further appears from the evidence that the parties, in reliance upon this arrangement, proceeded to operate the six-ton smelter and maintain the divided possession whereby Baker continued to operate the smelter and occupy the premises in conjunction with the watchman employed by the plaintiff.

The effect of such limitations upon the power of agents to waive the conditions in a policy has been a frequent subject of decision in the courts. The doctrine is well settled that such stipulations and limitations in a policy regarding the powers of agents, and the manner of waiving its conditions, do not preclude a waiver by the conduct of authorized agents in regard to future operations upon the premises. In Cooley's Briefs on Insurance (vol. 3, p. 2607), with respect to limitations of this character, it is said: "Even this limitation will not prevent an insured from relying on a parol subsequent waiver by an authorized agent or officer, as 'there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing.'" (*Orient Ins. Co. v. Knight*, 197 Ill. 190, [64 N. E. 339]; *Hanover Fire etc. Co. v. Dole*, 20 Ind. App. 333, [50 N. E. 772]; *Home Ins.*

Co. v. Gibson, 72 Miss. 53, [17 South. 13]; *Wilson v. Commercial Ins. Co.*, 51 S. C. 54, [29 S. E. 245, 64 Am. St. Rep. 700]; *Lamberton v. Connecticut F. I. Co.*, 39 Minn. 129, [39 N. W. 76, 1 L. R. A. 222]; *Renier v. Dwelling H. I. Co.*, 74 Wis. 89, [42 N. W. 208].) And again, with respect to subsequent changes, it is said: "If an insurer, or authorized agent, consents to changes which are required to be indorsed on the policy, and promises to make the necessary indorsement, having access to the policy for this purpose, but fails to make the indorsement through mistake, oversight or neglect, the insurer will be bound, if not by a waiver, at least by an estoppel *in pais*." (3 Cooley's Briefs on Insurance, 2617.) To this point very many cases are cited. And further on this subject in the same work (p. 2658), it is said: "If an insurance company, with knowledge of facts vitiating a policy, by its acts, declarations or dealings leads the insured to regard himself as protected by the policy, or induces him to incur trouble or expense, such acts, transactions or declarations will operate as a waiver of forfeiture, and estop the company from relying thereon as a defense to an action on the policy." The permission to operate the six-ton smelter was made in consideration of the additional rate charged and paid. It was in effect a new contract executed between the parties, a contract which the law does not require to be in writing. (*Knarston v. Manhattan L. I. Co.*, 140 Cal. 57, [73 Pac. 740].) The agent who made this new contract was a general agent of the company and had authority to issue and deliver policies. "Agents authorized to issue and deliver policies are regarded as having the same power to waive conditions in policies as the companies themselves, and can therefore waive conditions and forfeitures." (3 Cooley's Briefs, pp. 2479, 2504, 2505.) This rule includes all persons empowered to conclude contracts of insurance without first referring the negotiations to their principals, such as those who have "full power to effect contracts of insurance, to fix rates of premiums, to consent to changes, to make indorsements and cancel policies." (Cooley's Briefs, p. 2480.) Such limitations do not prevent the making of new contracts by the company or its authorized agents. (*Home Ins. Co. v. Nichols*, (Tex. Civ. App.) 72 S. W. 440; *Home Ins. Co. v. Gibson*, 72 Miss. 58, [17 South. 13].) And as a general rule a subsequent parol waiver by a general agent of conditions in a

policy are valid, although the policy requires them to be in writing. (*Farnum v. Phoenix Ins. Co.*, 83 Cal. 261, [17 Am. St. Rep. 233, 23 Pac. 869]; 3 Cooley's Briefs, pp. 2601, 2602-2608.) Waivers such as that here made, constituting, as they do, a new contract upon a sufficient consideration, need not be evidenced by a writing, and need not be indorsed on the policy, no matter what limitations or conditions are expressed in the policy, provided always they are made by an agent who would otherwise have authority to make the contract. (3 Cooley's Briefs, p. 2695.)

In *Gladding v. California etc. Ins. Co.*, 66 Cal. 6, [4 Pac. 764], the agent who attempted to waive the conditions was a local agent, and not, as here, a general agent, who, for contractual purposes, impersonated the company itself. The general remarks contained in the opinion in that case cannot be deemed authority, so far as they indicate a lack of power in the general agent to waive such conditions by acts amounting to a new contract or an estoppel, and without indorsement upon or attached to the policy. In *Shuggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408, and *Enos v. Sun Ins. Co.*, 67 Cal. 621, [8 Pac. 379], it was held that a mere local agent was without such authority unless specially empowered. This is the substance of the decision of the supreme court of the United States in *Northern Assur. Co. v. Grand View B. A.*, 183 U. S. 308, [22 Sup. Ct. Rep. 153, 154]. In the present case it clearly appears that the agents who gave the permission and made the written indorsement were the general agents of the company, with full powers. This indeed is not controverted. The failure to accurately describe the six-ton smelter in the slip attached to the policy was the fault of the defendant, and any attempt on its part to avoid the policy because of such failure would at once create an estoppel which would prevent the company from taking advantage of the misdescription. We are therefore of the opinion that the company waived the forfeiture which otherwise might have been caused by the increase of risk and partial change of possession in this case, and that it is now estopped from claiming such forfeiture after having knowingly allowed the parties to act in the belief that they had received the privilege which they were exercising and for which they had paid the additional premium.

3. The remaining defense is that the plaintiff has violated

the following clause in the policy: "Permission granted for the above described works to remain idle, it being warranted by the assured that at all times when the above works are idle or inoperative, one or more watchmen shall be constantly on duty at night." At the time of the fire there was a watchman, in the employ of the plaintiff, on the premises, whose duty it was to keep guard and watch against danger from fire. The fire occurred on April 2, 1901, near midnight, and at that time, instead of being on watch, he had gone to bed and was asleep. We think under these circumstances it must be admitted that the plaintiff was guilty of a violation of this condition, if, as a fact, he was bound, under the other circumstances attending the case, to keep a watchman constantly on duty during the night-time. The obligation to keep a watchman on duty would not be observed by having a man asleep upon the premises. Because of this failure of the watchman to keep on duty the policy would be void, unless the works were neither idle nor inoperative at the time of the fire, within the meaning of the above clause. This clause did not require that the plaintiff should have been running the works day and night. What is contemplated by such a clause is the ordinary operation of the works during usual and customary hours. (*Whitney v. Black River Ins. Co.*, 72 N. Y. 117, [28 Am. Rep. 116]; *Halpin v. Phoenix Ins. Co.*, 118 N. Y. 165, [23 N. E. 482]; *Kansas etc. Ins. Co. v. Metcalf*, 59 Kan. 383, [53 Pac. 68].) There was no evidence that it was usual or customary to operate such works at night, and the presumption is not that such is the case, but the contrary. (Code Civ. Proc., sec. 1963, subds. 20, 28.) The effect of such proof would be to establish a forfeiture, and consequently the burden was on the defendant to prove the usage or custom. In the absence of such proof we must conclude that the policy did not require that there should be a watchman on duty at night during times when the works were in operation during the day.

From the 16th of March until the night of the fire the six-ton furnace erected by Baker under a shed on the premises thirty feet from the main building was in daily operation in the smelting of slag and ore. This operation required the work of five or six men on the premises. In connection with this work they were using one of the boilers belonging to the works and the water-pipes and tools of the plaintiff, and were

occupying the buildings for the storage of ore and other materials. The six-ton furnace was a smelter, and was used to smelt the slag and ore in a manner substantially the same as that pursued in the use of the fifty-ton smelter covered by the policy. These four large smelters were not in use, nor was any other part of the buildings occupied in the work, except as above stated. Under these circumstances, we think the works were not idle or inoperative, within the meaning of the policy. Forfeitures are not favored in law. It was not necessary that the works should be kept in full operation or that all the furnaces should be kept going every day. A comparatively slight operation would suffice. The operation in good faith of one of the original furnaces would, so far as we can perceive, as effectually serve to prevent danger from fire at night, which was the object to be attained, as the full operation of all. Doubtless if Mackintosh himself had built an additional smelter on the grounds, and had operated the works with that alone, leaving the others idle, it would have been a sufficient performance of the obligation to run the works when there was no night watchman. The increase of the risk by the erection and operation of the six-ton furnace, as we have seen, was waived. That point being disposed of in that way, it is of no consequence, and does not change the legal rights of the parties, that the furnace in use was not one of the four which were insured, nor that it was not used by the plaintiff in person, but by Baker under the direction of the plaintiff or by his permission. There was a substantial operation of the works, which is all that was required. (*Bole v. New Hampshire F. I. Co.*, 159 Pa. St. 55, [28 Atl. 205]; *City etc. Mill Co. v. Merchant's etc. Ins. Co.*, 72 Mich. 654, [16 Am. St. Rep. 552, 40 N. W. 777]; *Prieger v. Exchange M. I. Co.*, 6 Wis. 104.) In *McKenzie v. Scottish etc. Ins. Co.*, 112 Cal. 548, [44 Pac. 922], and *Brehm L. Co. v. Svea Ins. Co.*, 36 Wash. 520, [79 Pac. 34], there was no operation of the premises at all comparable to that here shown, and these cases are not in point. As the works were not idle or inoperative, the necessity for a night watchman did not exist, and the fact that one was employed, but failed to watch, did not affect the validity of the policy.

The findings are not sustained by the evidence, and the judgment is therefore erroneous.

The judgment is reversed and the cause remanded for a new trial.

Angellotti, J., Sloss, J., McFarland, J., Henshaw, J., and Lorigan, J., concurred.

Rehearing denied.

Beatty, C. J., dissented from the order denying a rehearing, and filed the following opinion thereon on the 11th of March, 1907:—

BEATTY, C. J.—I dissent from the order denying a rehearing of this cause. It is conceded that there was no watchman on duty, but it is held that the works were in operation. This conclusion, in my opinion, is opposed to any reasonable construction of the policy.

I dissent also from the doctrine that the parties to a written contract cannot bind themselves by a stipulation that it shall not be altered except by an agreement in writing. By such a stipulation they merely import into the particular contract the beneficent principle of the statute of frauds, thereby protecting themselves from the consequences of false claims of alterations.

I deprecate especially the disposition of courts to deprive insurers on slight and insufficient grounds of the benefit of proper stipulations and conditions inserted in their policies for the legitimate and laudable purpose of compelling the insured to protect the insured property from unnecessary and easily prevented hazards. The necessary effect of such a course of decision is to increase premium rates, and the final result in the long run is that careful and honest policy-holders pay for the losses of the reckless and dishonest.

[S. F. No. 3497. In Bank.—February 6, 1907.]

CHARLES H. MACKINTOSH, Appellant, v. AMERICAN
FIRE INSURANCE COMPANY, Respondent.

FIRE INSURANCE—DECISION AFFIRMED.—The decision in case No. 3498, *ante*, p. 440, is affirmed and applied to similar facts in this case.

ID. — PROVISION FOR EMPLOYMENT OF WATCHMAN — DIFFERENCE IN PHRASEOLOGY IMMATERIAL.—*Held*, that the difference in phraseology of the clause relating to the employment of watchmen when the works were idle has no different effect from the clause considered in the case above referred to.

APPEAL from a judgment of the Superior Court of Alameda County. S. P. Hall, Judge.

The facts are stated in the opinion of the court in this case, and in case No. 3498, *ante*, p. 440.

Campbell, Metson & Campbell, G. W. Baker, and Thomas H. Breeze, for Appellant.

Goodfellow & Eells, for Respondent.

THE COURT—Appeal from a judgment for defendant in an action upon a policy of fire insurance.

The property destroyed was covered by various policies in addition to the one sued upon in this action, and actions were brought upon these different policies. In one of these cases (*Mackintosh v. Agricultural Fire Ins. Co.*), judgment went for the defendant, and that judgment has just been reversed by this court. (See opinion filed in *Mackintosh v. Agricultural Fire Ins. Co.*, *ante*, p. 440, [89 Pac. 102], S. F. No. 3498.) The present case presents the same facts as those considered by the court in the Agricultural Company's case. It is true that the phraseology of the "watchman clause" differs somewhat in the two cases. In the "Agricultural" case the policy read: "Permission granted for the above-described works to remain idle, it being warranted by the assured that at all times when the above works are idle or inoperative, one or more

watchmen shall be constantly on duty at night." In this case the policy contained the following: "Warranted by the insured that, during such time as the within described buildings or works are idle or not in operation, whether closed for repairs, or during the absence of workmen, or otherwise (except as otherwise herein provided), one or more watchmen shall be on duty constantly, day and night, in and immediately about the said buildings or works, and, if the said buildings or works shall at any time remain shut down for more than thirty (30) days, notice shall be given this company, and permission to remain so shut down be obtained and indorsed hereon, or this policy shall be null and void." But it is not claimed by the appellant that this clause has, so far as the points raised on this appeal are concerned, any different effect from that of the clause in the Agricultural policy, and we think the views expressed by us on the other appeal are equally applicable here.

For the reasons stated in the opinion in *Mackintosh v. Agricultural Fire Ins. Co.*, ante, p. 440, the judgment is reversed and the cause remanded for a new trial.

[Sac. Nos. 1310 and 935. In Bank.—February 7, 1907.]

DAVID BROWN, Respondent, v. L. J. KLEMMER, Treasurer of Glenn County, Appellant.

C. D. DAVIDSON, Respondent, v. L. J. KLEMMER, Treasurer of Glenn County, Appellant.

ROAD DISTRICT—TRANSFER FROM GENERAL FUND UNAUTHORIZED.—There is no statutory provision which authorizes the supervisors to transfer money from the general fund to the fund of any road district.

ID.—EXPENSE OF BRIDGES—PAYMENT OUT OF GENERAL FUNDS—EXCLUSIVE METHOD.—Section 2712 of the Political Code authorizes a portion of the expense of the construction, maintenance, or repair of a bridge to be paid for out of the general road fund of the county, when it appears that the road district would be unreasonably burdened by the expense thereof, or, by vote of two thirds of the supervisors, they may, in their discretion, pay a portion of it out of the general fund as well as out of the general road fund. This method is exclusive.

APPEALS from judgments of the Superior Court of Glenn County. Oval Pirkey, Judge.

The facts are stated in the opinion of the court.

R. L. Clifton, for Appellant.

Charles L. Donohoe, Frank Freeman, and Snook & Church, *Amici Curiae*, for Respondent.

ANGELLOTTI, J.—By stipulation these two cases are to be heard and determined together. The facts are alike, and the law applying to each case is the same. The action is in *mandamus* to compel the defendant as county treasurer of Glenn County to transfer from the county general fund, in the one case the sum of \$1,512, to the fund of road district No. 2, and in the other case the sum of \$854 to the fund of road district No. 5. Demurrers were interposed to the petitions and overruled, and defendant having failed to answer, judgment was given in each case that a peremptory writ of mandate issue in accord with the prayer of the petition. Defendant appeals from said judgments. The question before us is as to whether the petitions stated facts sufficient to justify the issuance of the writs.

According to the allegations of the petitions, the material facts were as follows: On February 5, 1904, the board of supervisors of Glenn County, by a two-thirds vote, made an order declaring with respect to each of said road districts that the expense of repairs theretofore made to certain bridges therein, if paid in full out of the funds of said road districts, would not only unreasonably overburden but would impoverish said districts, that one half of such expense, \$1,512 in one case and \$854 in the other, would be a just and reasonable portion thereof to be paid out of the county general fund, and ordering that "for the purpose of paying one half of the cost of repairs," the respective sums aforesaid be transferred from the county general fund to the road district funds, and directing the auditor and treasurer to make the transfers accordingly. There was no order for the payment of any money on account of the repairs, the order being simply one for the transfers. Although there was sufficient money in the county

general fund, the treasurer refuses to make the transfers ordered, and it is to compel compliance with said order that these proceedings were instituted.

We are unable to find in the statutes any authorization for the order made by the board of supervisors. No such authority is to be found in subdivision 18 of section 25 of the County Government Act (Stats. 1897, p. 463) empowering the supervisors to establish such funds "as they may deem necessary and to transfer moneys from one fund to another, as the public interest may require." This is established by the decision in the case of *Potter v. Fowzer*, 78 Cal. 493, [21 Pac. 118], where a transfer from the county general fund to a road district fund was attempted to be justified under a similar provision of the original County Government Act. The court there said: "Under this provision the supervisors may establish county funds, and may transfer money from one fund to another, when required by the public interest, but it cannot be construed to authorize the transfer to a fund established by law, and expressly limited in the amount of its receipts." There is no statutory provision which in terms empowers the board of supervisors to transfer money to the fund of any road district.

It is sought to justify the order upon the ground that under the statute, by a two-thirds vote of the board of supervisors, the county general fund could be resorted to for the purpose of paying a portion of the cost of these repairs. Ordinarily, the general county fund, collected for general county purposes from all portions of the county, including municipalities, cannot be used for county highway purposes at all. The legislature has, however, provided that the cost of certain highway work may be wholly or partially paid for from such general fund. Section 2712 of the Political Code authorizes this to be done in the case of bridge work under certain circumstances, providing that when it appears that a road district would be unreasonably burdened by the expense of constructing, maintaining, or repairing a bridge, the supervisors "may, in their discretion, cause a portion of the aggregate cost or expense to be paid out of the general road fund of the county, or by a vote of two thirds of the board of supervisors, said board may, in their discretion, order a portion of the cost of construction and repairs of bridges . . . to be

paid out of the county general fund as well as the general road fund." (The italics are ours.) It will be seen that this section does not purport to authorize any order for the transfer of money *to a road district fund*, but simply authorizes an order for the *payment out of* the general road fund and *out of* the county general funds of amounts that would otherwise be payable only from a road district fund. The section authorizing this exceptional use of the county general fund thus prescribes the method, which is by ordering the payment *directly* from that fund. We are satisfied that the method so prescribed should be held to be exclusive. An examination of the other sections authorizing the use of the county general fund for certain highway purposes discloses the fact that in each case the provision is that the cost apportioned to such fund shall be charged to or paid from the general county fund (Pol. Code, secs. 2643 (subd. 10), 2647), and subdivision 8 of section 2643 provides that in auditing claims the board shall "specify the fund, or funds, from which the whole or any part of any claim, . . . must be paid." We cannot avoid the conclusion that the legislature intended that payments for highway purposes authorized to be made from the county general fund should be made directly therefrom, and not accomplished through the circuitous method of a transfer to a road district fund and payment therefrom. Nor should it be held that the distinction here made is one only of form and not of substance. This very case suggests a reason in support of the method provided. While it is declared in the order of transfer that the transfer is for the purpose of paying a portion of the expense of this bridge work, there is no order for such payment. How can it be known that the money so transferred, instead of being devoted to this purpose, will not ultimately be used, as all real road district money may be used, for some district highway purpose for which the county general fund cannot be resorted to? As is pertinently asked by counsel for defendant, "Must the treasurer keep a fund within a fund, and check up to know whether the supervisors have expended the transferred money for the special purpose?" Were such a method as is here attempted generally followed it would lead to endless confusion in the accounts of the various road districts, and render it exceedingly difficult to determine exactly for what highway purposes the general

county fund was in fact used by the board of supervisors, and whether the same was used for a prohibited purpose or not.

No possible legitimate reason can be suggested for such an order as is here involved. If county general fund money can be used to pay the expenses incurred in these repairs, an order of payment directly from such fund may be made. If there be any reason why they cannot be paid directly from that fund, the same reason is sufficient to forbid their payment in the manner here attempted. If they cannot be directly paid from the general fund, they cannot be indirectly so paid.

It is, however, sufficient for all the purposes of this case that there is no authority in the law for any such order of transfer on the part of the board of supervisors. The legislature has seen fit to prescribe a different method for the payment of moneys for certain highway purposes from the county general fund. The order, therefore, was void, and the treasurer, in the discharge of his official duties, properly refused to comply with the same.

The judgment in each case is reversed.

Sloss, J., Henshaw, J., and Beatty, C. J., concurred.

[S. F. No. 3546. In Bank.—February 7, 1907.]

CHARLES E. LIVERMORE, Executor of Estate of Teresa B. Livermore, Respondent, v. **GIOVANNI B. RATTI**, personally, and as Administrator of Estate of Delfina L. Ratti, Deceased, Appellants.

GUARDIAN AND WARD—SETTLEMENT OF FINAL ACCOUNT—NOTICE REQUIRED—CONSTRUCTION OF CODE.—Under section 1789 of the Code of Civil Procedure, providing that the proceedings for the settlement of the account of a guardian, and the notice required thereof, are the same as those required upon the settlement of the accounts of an executor or administrator, section 1634 of that code, providing for a final settlement of the accounts of an administrator or executor upon petition for distribution, is applicable as to the notice required for the settlement of the final account of a guardian, and

notice must be given for the full period of ten days before the hearing.

ID.—DEATH OF WARD—SETTLEMENT WITH ADMINISTRATOR—NOTICE OF HEARING.—Upon the death of a ward, before settlement of the final account of the guardian, the guardian is required, under section 1754 of the Code of Civil Procedure, to settle his accounts with the legal representative of the ward, who must have actual or constructive notice of the hearing for the period of ten full days in his representative capacity to make it at all effective.

ID.—DELAY OF GUARDIAN TO SETTLE WITH WARD—INSUFFICIENT NOTICE TO ADMINISTRATOR—JURISDICTION—VOID SETTLEMENT AND LIEN.—Where a guardian delayed settlement with the ward after becoming of age, and presented the final account after her death, while petition for letters upon the ward's estate was pending, and the administrator thereof was appointed seven days before the hearing, and did not appear thereat, or have constructive or actual notice as administrator for the required period, the court had no jurisdiction to settle the account, or to impose a lien for the balance of account upon the real estate of the deceased ward, and the order settling the account and imposing such lien was void.

ID.—ACTION TO FORECLOSE LIEN—RECITALS IN RECORD—POSTING OF NOTICES—APPEARANCE NOT PRESUMED—EVIDENCE TO SHOW WANT OF JURISDICTION.—In an action to foreclose such lien against the estate of the deceased ward, where the recitals in the record settling the account of the guardian show that notice thereof was given by posting, it will not be presumed that jurisdiction was acquired by appearance; and evidence is admissible to show that the legal representative of the ward's estate was not in existence to receive notice during a necessary part of the ten days required.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. S. P. Hall, Judge.

The facts are stated in the opinion of the court, and more particularly in the opinion rendered in Department One.

Metcalf & Metcalf, and Johnson & Shaw, for Appellants.

George W. Langan, and Wm. R. Davis, for Respondent.

SHAW, J.—In the petition for rehearing it was urged that the recital in the order settling the final account of the guardian, that "proof was made to the satisfaction of the court that notice of said settlement had been given as re-

quired by law, and as ordered by the court," is, upon this inquiry, which in effect is collateral, conclusive evidence that the representative of the deceased ward's estate had, in some manner, received due and legal notice of the time and place of the hearing of the account; that it conclusively established jurisdiction; and that we cannot look into the record to ascertain what notice was in fact given to him, or receive proof of other facts outside the record to show the lack of jurisdiction. The rehearing was granted chiefly for the purpose of re-examining this point. Upon further consideration we are satisfied that the proposition is untenable.

The proper solution of the question depends upon the applicability of section 1634 of the Code of Civil Procedure to the proceedings for the settlement of the final account of a guardian. That it does apply thereto has not been disputed by either party. Section 1789 of the Code of Civil Procedure provides that the proceedings upon the settlement of the account of a guardian, and the notices required thereof, are the same as those required upon the settlement of the accounts of an executor or administrator. Section 1634 of the Code of Civil Procedure provides that if the account filed by an administrator or executor be for a final settlement of the estate, and a petition for final distribution of the estate is filed therewith, notice of the time and place of the hearing thereof must be posted or published for at least ten days prior to the day fixed for said hearing. No other provision is made specifically relating to a final account. It has been, so far as we are advised, the universal custom throughout the state to treat this provision as applicable to a guardian's final account and to require ten days' notice thereof. The final account of a guardian is in many respects the counterpart of the final account and petition for distribution of an executor or administrator. In the latter the balance due is determined and ordered paid over to the persons found to be the heirs, legatees, or creditors. In the former the balance is ascertained and ordered paid over and delivered to the ward, if living, or to his representative, if he is dead. (Code Civ. Proc., sec. 1754.) We think it is reasonable to conclude that the legislature deemed the two proceedings to be analogous and intended that the same procedure should apply to both, so far as the notice to be given is concerned.

The court could have acquired jurisdiction of the administrator of the ward's estate in but three ways: firstly, by his appearance at or before the hearing, by which act he would have submitted himself to its jurisdiction; secondly, by the issuance of a citation to him and its personal service on him; thirdly, by the constructive service of notice upon him, by posting or publishing the same as required by law for ten days before the day set for the hearing. The latter notice is recited in the record, but there is nothing whatever in the record to indicate that any order was made by the court, or that there was any citation issued, or any appearance by or for the administrator. The proofs which constitute a part of the record show that the recital regarding the posting of notice was true. With respect to the order of the court, referred to in the recital, the record is silent. The law, however, does not provide for any order of court, except in the contingency that at the time of the hearing the court, or a judge thereof, deems the notice given by posting insufficient (Code Civ. Proc., sec. 1633), in which case a further notice may be ordered. This would necessarily require a continuance of the hearing to another day. The record shows affirmatively that there was no continuance, thus demonstrating that there was no order for any further notice, or that, if there was, no such notice could have been given, which fact would of itself be fatal to the existence of jurisdiction. With regard to the possible fact of an appearance by or for the administrator, it may be that if the record had been silent concerning any sort of notice, the usual presumptions in favor of the validity of the proceedings of a court of general jurisdiction would prevail, and such appearance would, if necessary, be conclusively presumed. But on that point the rule laid down in the leading case of *Hahn v. Kelly*, 34 Cal. 407, that "when the record states what was done, it will not be presumed that something different was done," applies. The record here states that the jurisdiction was acquired by the posting of notices, which is shown both by the recital and by the proofs on file, and it will not be presumed that it was acquired in some other way, as by an appearance. If service of notice in the manner recited was legally possible, it will be presumed that it was made, although the proof on file may be defective. In that event, it would be presumed that proof was made by

parol, or that the corrected proof had been mislaid. (*Sacramento Bank v. Montgomery*, 146 Cal. 751, 752, [81 Pac. 138].) The validity of the order, therefore, depends on the question whether or not, under the circumstances appearing outside the actual record of the proceedings, it was legally possible that the notice could have been given to the legal representative of the ward for ten days before the hearing.

Upon the death of the ward the law, as shown in the original opinion, to which we still adhere, requires the settlement to be made with the legal representative, and the constructive notice of ten days must have been operative upon that representative for the full period of ten days, and that in his representative capacity, to make it effective at all. For the purpose of showing that jurisdiction could not have been acquired in the manner shown by the record, evidence is admissible to prove any fact the existence or non-existence of which is not conclusively established by the record or its recitals. Thus, if a judgment against a corporation recites due service of process upon the corporation, or the appearance for it by some authorized person, it may be set aside upon proof that it had been dissolved, and had no legal existence for any purpose at the time the action was begun and until the rendition of the judgment. So, also, if a judgment against a natural person recites due service of process on him, his heirs or legal representatives may show that such service was impossible, and that the judgment was void, by proof that he was dead before the action was begun.

In like manner the giving of an effective notice in the manner here recited is shown to be impossible, and the order is accordingly avoided, by proof of the fact that the legal representative of the ward was not in legal existence to receive it during a necessary part of the ten days for which it was running; that is, that he was not appointed until March 20, 1899, which was only seven days prior to the day upon which the order was made. Neither the record, nor the recital of the giving of the notice, nor the presumptions in favor of the jurisdiction of the court, are conclusive of the fact of the existence of the administrator as such, during the whole or any part of the ten days, any more than they would be conclusive of the existence of the corporation, or of the fact that the defendant was alive, in the instances above referred to.

The actual, effective time of the notice to the administrator was, therefore, only seven days, whereas the law requires ten days to constitute legal service. Jurisdiction to hear the settlement of the account was therefore wanting, and the order was void.

The judgment and order are reversed.

Angellotti, J., Sloss, J., Henshaw, J., McFarland, J., and Lorigan, J., concurred.

Beatty, C. J., concurred in the judgment.

The following is the opinion rendered in Department One, May 24, 1906, referred to in the foregoing opinion:—

SHAW, J.—This is an appeal by the defendants from the judgment and from an order denying their motion for a new trial. The complaint sets forth an action to enforce a lien against certain lands formerly belonging to the deceased Delfina L. Ratti, the said Giovanni being her sole surviving heir at law.

Teresa B. Livermore was the mother of the deceased Delfina L. Ratti. In April, 1888, she was appointed guardian of the person and estate of Delfina, and continued to act in that capacity until the said Delfina arrived at the age of eighteen years, which was on the 25th of November, 1892. No account of her trust as guardian was ever filed or presented to the court during the minority of the ward, nor at all until March 15, 1899. On September 29, 1897, the ward, Delfina, was married to the defendant, Giovanni B. Ratti, and on September 19, 1898, she died intestate, leaving surviving her husband and one child, which child has since died at the age of four months. On March 15, 1899, when the guardian, Teresa B. Livermore, filed her final account as guardian of her daughter, Delfina, there had been no administrator appointed of the estate of her said daughter, although proceedings to that effect were then pending and were set for hearing on March 20, 1899. The hearing of the final account filed on March 15th was set for March 27th, and the usual ten days' notice of that hearing was given by posting, in the manner required by the statute. On March 20th the defendant, Giovanni, was appointed administrator of the estate of the ward. The order settling the

account recites that proof was made to the satisfaction of the court that notice of said settlement had been given as required by law and as ordered by the court. The account showed disbursements of \$1,508.18 by the guardian in excess of cash receipts, and that the entire estate of the ward consisted of a one-ninth interest in certain real estate. The order settled and allowed this balance, and declared that it should be a charge against the estate of the ward. The purpose of the action is to have this charge declared a lien against the estate and enforced by foreclosure.

The respondent contends that the order settling the final account and declaring the balance a charge upon the estate of the ward is invalid for want of jurisdiction in the court over the legal representative of the ward. By the provisions of section 1754 of the Code of Civil Procedure it is made the duty of the guardian "at the expiration of his trust, to settle his accounts with the court, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto." The proceedings to settle the account of a guardian instituted after the ward has arrived at full age, or after the ward has deceased, is one in which no persons are directly interested except the guardian, on the one hand, and the ward, or his legal representative, on the other. The proceeding is regulated by the provisions of the act concerning administrators of deceased persons (Code Civ. Proc., sec. 1789), and under section 1634 of the Code of Civil Procedure, when a final account is to be settled, notice of at least ten days must be given of the time and place of the hearing thereof. The effect of the provisions of section 1754, above quoted, in a case where the ward has deceased, is that the proceeding for the settlement of the account must be had with the legal representative. It would seem to be a reasonable conclusion from this provision that such proceeding cannot be instituted nor determined unless there is a legal representative against whom it can be prosecuted, who may appear and resist the claims of the guardian, and who may be bound by the adjudication therein made. His interests are adverse to those of the guardian, and he is a necessary party to the proceeding, although he may be brought in by constructive

notice only. It is a proceeding of a special nature in which the only process required by law is the posting of a general notice for ten days. In all cases where by statute a substituted service of notice is authorized in place of actual service, a strict compliance with the statute is essential to a valid service. (17 Ency. of Plead. and Prac. 45; 19 Ency. of Plead. and Prac. 625; *Forbes v. Hyde*, 31 Cal. 342; *Ricketts v. Richardson*, 26 Cal. 149; *People v. Huber*, 20 Cal. 81; *McMinn v. Whelan*, 27 Cal. 300.) A publication or posting for less than the required time is ineffectual to give jurisdiction, and renders the subsequent proceedings under such notice void. (17 Ency. of Plead. & Prac. 94; *Foster v. Vehmeyer*, 133 Cal. 460, [85 Pac. 974].) The theory upon which such constructive service is allowed as a substitute for actual service is, that if such public notice is given for a reasonable time, the parties interested will, during the prescribed period, thereby obtain knowledge of the proceeding, and where the proper notice is given for the required time such knowledge is conclusively presumed. The legislature, within reasonable limits, has power to determine the length of the period over which the publication is to extend. Such determination implies that in the legislative judgment the whole of the period is necessary to create the presumption that the published notice has imparted knowledge to the persons interested. It is always in the power of the guardian to procure the appointment of an administrator with whom he may settle the account, and who will then be in existence to receive such constructive notice. Such legal representative being made by the statute a necessary party to the settlement, and constructive notice being authorized as to him, and the only notice given him, as in the present case, it seems to follow that his existence during the entire period required to make that form of service valid is necessary to raise the statutory presumption that he has obtained from such notice a knowledge of the pendency of the proceeding. In cases under the statute, where the ward dies before the account is filed, the full period of posting must run while the person against whom the notice is directed is in legal existence and capable of receiving such knowledge; otherwise there will not be the full statutory notice to him, and jurisdiction of the proceedings will be lacking. The giving of such notice before the appointment of a legal representa-

tive, or in part before and in part after such appointment, will not give the court jurisdiction to make a valid order settling the account. In the present case the notices were posted on March 16, 1899, the legal representative was not appointed until March 20, 1899, and the hearing of the account and the order settling it was on March 27th. The administrator was not legally in existence in his representative capacity to receive such constructive notice during the period of the notice, except for the last seven days thereof, and consequently he could not in that capacity have received the full statutory constructive notice, upon which alone jurisdiction to make the order was predicated.

It follows, therefore, that the order in question is invalid. The evidence is therefore insufficient to support the finding that the order settling the account was duly given and made; the court erred in admitting the order in evidence over the objection of the defendant; and as the findings show the dates of the notice and order and of the appointment of the administrator, and the consequent invalidity of the order, they are not sufficient to support the judgment.

In view of the conclusion we have reached upon this point in the case, it is unnecessary to consider the effect of the previous judgment as a former adjudication of the same cause of action, nor the numerous other questions presented.

The judgment and order are reversed.

Angellotti, J., and Sloss, J., concurred.

[S. F. No. 3573. In Bank.—February 7, 1907.]

GROCERS' FRUIT GROWING UNION, Respondent, v.
KERN COUNTY LAND COMPANY, Appellant.

VENUE—REAL ACTION—SPECIFIC PERFORMANCE BY PURCHASER—CONVEYANCE OF TITLE—INCIDENTAL ACCOUNTING.—An action by a purchaser for a specific performance of a contract for the sale of land, and to compel a conveyance under an allegation that the purchase price has been paid, pursuant to agreement, from the proceeds of sales of fruits and lands made by defendant, for which proceeds an accounting is sought, with judgment for a surplus alleged, is in its nature

an action to determine a right or interest in real property under subdivision 1 of section 392 of the Code of Civil Procedure, which, wherever commenced, must be tried, upon demand by the defendant, in the county where the land is situated. The accounting of profits to determine payment of the purchase money and to obtain judgment for any surplus, is merely incidental to the real cause of action and relief sought, and does not change the nature of the action.

ID.—RIGHT OF CORPORATION TO CHANGE VENUE—PROTECTION UNDER FOURTEENTH AMENDMENT—CONSTRUCTION OF STATE CONSTITUTION AND LAW.—The right of a corporation sued in the county of its principal place of business, pursuant to subdivision 16 of article XII of the state constitution, "subject to the power of the court to change the place of trial, as in other cases," to have the venue of an action to compel a conveyance therefrom changed to the county where the land is situated, under subdivision 1 of section 392 of the Code of Civil Procedure, is to be viewed in the light of the fourteenth amendment to the federal constitution, which insures to corporations and individual persons equal protection under state laws.

ID.—PLACE OF COMMENCEMENT OF ACTION—PLACE OF TRIAL.—An action for specific performance is not an action "for the recovery of the possession of" or "quieting the title to real estate," which is required under section 5 of article VI of the constitution to be commenced in the county where the land is situated. Such action is only required to be tried in the county where the land is situated. It may still be commenced in the county of the principal place of business of a corporation defendant, and the right remains to the corporation to have the place of trial changed to the county where the land is situated, under subdivision 1 of section 392 of the Code of Civil Procedure.

APPEAL from an order of the Superior Court of the City and County of San Francisco, refusing to change the place of trial of an action. M. C. Sloss, Judge.

The facts are stated in the opinion of the court.

Page, McCutchen, Harding & Knight, and W. S. Barnett, for Appellant.

Edwin L. Forster, Robert B. Moody, and F. T. Poore, for Respondent.

HENSHAW, J.—This action was commenced in the city and county of San Francisco. Defendant appeared, and upon filing its demurrer made demand and moved the court that the place of trial of the action be changed from the city and

county of San Francisco to the county of Kern. The motion for a change of venue was denied, and defendant takes this appeal, contending,—1. That the action is one for the specific performance of a contract to convey lands, which lands are admittedly situated in the county of Kern; that under section 5 of article VI of the constitution of this state the superior court of San Francisco had no jurisdiction over the action for that it should have been *commenced* in the county of Kern; and 2. That the action is strictly one within the letter and the spirit of section 392 (subd. 1) of the Code of Civil Procedure, and should therefore have been transferred to the county of Kern for *trial*. In this connection it is urged and argued that if the proposition be advanced that section 16 of article XII of the constitution warrants the commencement of the action in the city and county of San Francisco, and forbids to defendant its right to change the place of trial, then this clause of our constitution is violative of the fourteenth amendment to the constitution of the United States in denying to corporations the right to have an action affecting an interest in real estate tried in the county where the land is situated, while this right is accorded to natural persons.

The respondent insists that the action is brought under section 395 of the Code of Civil Procedure; that it is of the class where real and personal actions are joined in the same complaint, and, upon the authority of *Smith v. Smith*, 88 Cal. 572, [26 Pac. 356], and other cases of similar import, must be tried in the county of defendant's residence; that as the city and county of San Francisco is the principal place of business of the corporation defendant, it is its residence within the purview of this section; and that the action was therefore commenced and should be tried before the superior court of that county. Resting its case upon this proposition, respondent has declined to discuss the constitutional questions advanced by appellant.

It thus becomes necessary to determine the true character of this action as disclosed by the complaint. Plaintiff charges that defendant was the owner of certain lands in the county of Kern, and that plaintiff and defendant entered into written contracts for the purchase and sale of these lands, the purchase price being thirty-five thousand dollars, to be paid in installments at specified periods of time. Plaintiff under

the terms of these agreements entered into possession of the lands and cultivated them, planting large quantities of fruit-trees, erecting substantial improvements, and thereby greatly increasing the value of the property. These contracts, it is averred, were entered into in writing "between the third day of June, 1893, and the first day of January, 1897." It is then averred that on the sixth day of March, 1899, the plaintiff and defendant entered into an agreement in writing, which is set forth in full in the complaint. That agreement recited the making of the earlier contracts above noted, the taking possession of the lands by plaintiff herein, the planting of fruit-trees with the object of selling the improved lands "in small tracts." The agreement further declared that the Grocers' Fruit Growing Union is in default in a large amount, and that the sum of \$39,448.75 will be due on November 1, 1899, from the Grocers' Fruit Growing Union to the Kern County Land Company, and that the Grocers' Fruit Growing Union is unable to pay this money. Moreover, that it is without financial ability to carry on the business or to cultivate the orchard, to prune the trees, gather and handle the crop, and that it is desirous of obtaining financial assistance from the defendant to enable it to do these things. It was therefore agreed that the defendant would advance to plaintiff moneys sufficient to enable it to carry on its undertaking, and plaintiff agreed upon its part to cultivate, take care of and handle the fruit crop and the lands, and sell and market the same through the defendant; that it would sell the orchard lands, if opportunity presented, the sales always to be subject to the approval of the defendant, and the proceeds of the fruit crop and of the sale of lands should be applied, first, to the repayment of moneys advanced by defendant, and, second, towards the extinguishment of the indebtedness due on account of the original contracts for the purchase and sale of the lands, together with interest. Plaintiff further agreed that on or before the first day of November, 1899, it would pay the sum of thirty thousand dollars in addition to the repayment of the advances which might be made by defendant as full payment of the purchase price of the lands, and agreed that if it was unable to pay or failed to pay by that date all sums of money that should have been advanced to it, together with the sum of thirty thousand dollars in satisfaction

of the indebtedness due from it, it would, on the first day of November, 1899, execute and deliver to defendant a good and sufficient deed of conveyance of all the lands, and peaceably quit and surrender possession thereof and surrender and cancel the contracts for the purchase of the lands, and deliver to the defendant all the personal property of every nature and kind on the said lands, and execute a bill of sale for the personal property; that it would also assign all contracts that it might then have with any person for the sale of any of the lands, or otherwise, and all obligations that it might then have or hold from any person or persons for the payment of any sum of money on account of the sale of the lands. Time was declared to be of the essence of the contract.

As to the transactions following this agreement, it is alleged that before the first day of November, 1899, the president of defendant corporation urged the plaintiff corporation to make the deed and bill of sale referred to in the agreement, "saying and representing that the plaintiff had not performed and could not perform its said agreement, and that this would avoid litigation, and that the plaintiff corporation could afterwards have all the time it wanted to make the thing right, and that the defendant corporation would help it." It is next averred that "thereafter and in the month of November, 1899, the plaintiff corporation acting upon and pursuant to all of the aforesaid statements and representations, and believing them to be true and made in good faith, executed to defendant corporation its deed to said lands and its bill of sale of all of its personal property in the manner specified in said agreement of March 6, 1899, and that had it not been for said statements and representations, said plaintiff corporation would not have executed said deed or bill of sale, or either of them, that in truth, by reason of the failure and neglect of the defendant corporation to account to the plaintiff corporation for moneys received by it from sales of crops and lands and moneys advanced by it, as hereinafter alleged, plaintiff was in ignorance of its financial standing and ability to perform its said agreement, and that by reason of its being so kept in ignorance, was induced to rely and act upon said statements and representations." It is then alleged that the original agreements of sale were never rescinded, extinguished, or canceled, but have remained and

still remain in full force and effect; that the agreement of March 6, 1889, "was executed solely for the purpose of fixing the amount of the indebtedness then due and as a further security therefor, and of arranging means of settlement and enforcement in the event that said indebtedness should not eventually be paid." It is further alleged that the deed and bill of sale executed by plaintiff to defendant in November, 1899, were understood and intended to operate by way of mortgage and further security. Next it is averred that demand had been made upon the defendant before as well as after the execution by plaintiff of its deed and bill of sale in November, 1899, for an accounting of the proceeds of the sales of the fruit crop, of the advances by defendant to plaintiff and of the sales of the lands, but that defendant has neglected and refused to make such accounting. Upon information and belief the plaintiff then alleges the fact to be that by the receipts of the proceeds of the sale of fruits and lands the advances of the defendant and the indebtedness on account of the purchase of the lands have been fully paid, and that there is an excess or surplus of moneys over and above such indebtedness due from the defendant to plaintiff. By reason of which "plaintiff is entitled to an accounting by the defendant, and thereupon to a judgment against the defendant for the transfer and reconveyance of said real and personal property, and to a judgment for the surplus or excess of said proceeds from said sales above the amount necessary to discharge said indebtedness and advances, and for interest on such surplus or excess," and the prayer of the complaint is for an accounting; that upon the accounting it be adjudged that the indebtedness and advances have been fully paid and discharged, and that plaintiff have judgment against defendant for any surplus or excess; that the court adjudge that the agreements of sale have never been rescinded, executed, or canceled, and are in full force and effect; and that defendant be ordered and directed to execute and deliver to plaintiff due and legal conveyances of the real property in fee simple absolute, and due and legal transfers of all personal property.

Stripped to its essentials, this is simply an action for the specific performance of a contract for the sale of land under an allegation that the purchase price has been paid. If it be

conceded that the right to an accounting is sufficiently pleaded, that accounting is but an incident in the transaction. It goes merely to the establishment of the proposition as to whether or not the consideration has been paid. That the alleged collections made by defendant exceed the amount due from plaintiff does not in any sense change the character of the action, even though, upon proof being made, plaintiff would be entitled to a personal judgment for the excess. In any action for specific performance when the matter in dispute is the payment or non-payment of the purchase price an accounting may be necessary, and if necessary will be ordered, such being clearly within the power of a court under our system where equitable and legal functions are exercised by the one tribunal. — But such an accounting in no way changes the cause of action. — This case is in all essentials like that of *Bush v. Treadwell*, 11 Abb. Pr. (N. S.) 27. That was an action brought in Monroe County to have the title to certain real estate in the city of New York declared to be in plaintiff on the ground that the deed conveying the title to defendant was a mortgage, for a conveyance of the property to plaintiff, and for an accounting by defendant of the rents, issues, and profits. Defendant made a motion for change of the place of trial from Monroe County to the county of New York under section 123 of the New York code, from which our section 392 of the Code of Civil Procedure is taken. It was there urged in resisting the motion that the cause of action was transitory and not local, that section 123 of the New York code related to actions of legal cognizance only, and that the present action was in equity; that the relief sought was an accounting by the defendant, that the accounting might show advances beyond the value of the trust estate, in which case no land would be transferred or conveyed, that land was not the primary object of the action, and that the fact that land might be affected by the determination was not sufficient to entitle the defendant to a change of the place of trial. The court of appeals declared that the action was for the recovery of an interest in real property, and for the determination of such an interest, “and the statute declared in plain language that where such an action is brought it is local, and that this shall be so without regard to the form in which the determination is sought.” — So here, while the pro-

ceeding may necessitate an accounting, the relief sought is a conveyance of the land. And if it should be determined that a payment in excess of the consideration had been actually made, the personal judgment which would follow for plaintiff would, as in *Bush v. Treadwell*, be but incidental to the real cause of action and relief sought. *Smith v. Smith*, 88 Cal. 572, [26 Pac. 356], upon which respondent most strongly relies, was vitally different in character. In that case personal property consisting of twenty-six thousand sheep, with horses, wagons, harness, and camp equipage, together with real estate in Tuolumne and Merced counties, was by conveyance absolutely transferred to the defendant. Plaintiff sought in that action to have the transfer declared to be a mortgage, and alleged that the property so mortgaged had earned and paid funds more than enough to extinguish the mortgage indebtedness, and thus sought an accounting, a personal judgment for the excess, and a reconveyance of the property transferred. Here the cause of action was plainly twofold, and twofold owing to the very nature of the original transaction. It was transitory and personal as to the accounting for the vast amount of personal property which had been conveyed. It was local as affecting the title to the land. That action was commenced in the county of Tuolumne against the defendant, who was a resident of the county of Merced, and who, because of the nature of the action, was insisting upon his right to have the place of trial changed to the county of his residence, in which contention this court held that he was right because of the clear joinder of an action local with one which was transitory, the venue for the trial of such an action being the county of the defendant's residence. -But here we have an action strictly local in character, clearly affecting the title to land, the gist of the action being specific performance of a contract for the conveyance of land, the principal relief which is sought being a conveyance of the land, and the defendant is asking that the place of trial be changed to the county where the land is situated. -

It having been determined that in its character this action is local, it will not be questioned that in this regard it is one of those actions provided for by section 392 (subd. 1) of the Code of Civil Procedure. -It is an action for the determination of a right or interest in real property. Such an action,

as the above-cited section of the code declares, must be tried in the county where the land is situated.- Since the legislature has decreed that all such actions must be tried in the county in which the land is situated, the test thus is made the subject-matter of the action. Where the subject-matter of the action—to wit, land—is made the test for fixing the place of trial of the action, no reason or distinction appears, or can be made to appear, why the right should be given to a natural person to have such an action tried in the county where the land is situated, and the same right should be denied to an artificial person, a corporation.- In *State v. Hayes*, 81 Mo. 574, it is held that the provisions in regard to the venue of an action involve rights in respect to which the fourteenth amendment of the constitution of the United States forbids arbitrary discrimination. That the discrimination is arbitrary and rests upon no logical or rational distinction seems too plain to permit of debate or to call for elaborate consideration.- No conceivable ground can be suggested why a natural person should have the right of trial of an action involving an interest in land in the county where the land is situated, and the same right should be denied to a corporation.- If the situation were reversed the absurdity would be patent. A law which granted to a corporation the right and denied it to a natural person would be held arbitrarily discriminative without a moment's hesitation. Yet it must be recognized that a refusal to change the place of trial in such a case as this has been sanctioned in *Miller v. Kern County Land Co.* 134 Cal. 586, [66 Pac. 856], and *Miller v. Kern Land Co.*, 140 Cal. 132, [73 Pac. 836]. The justification was based upon the language of section 16 of article XII of our constitution. That section provides that "A corporation . . . may be sued in the county . . . where the principal place of business of such corporation is situated,-subject to the power of the court to change the place of trial, as in other cases." In those cases it was held that the constitution could fix the place of trial of actions against corporations, and that having so fixed it in the county of the principal place of business of the corporation, the force of this constitutional provision could not be impaired by any legislative enactment fixing the place of trial as to natural persons in other places, since that would be in effect to allow a legislative enactment to modify

and control a constitutional provision. Of the soundness of the determination in this case, so far as concerns the points which were presented and determined, there can be no question, but the particular proposition here and now advanced—namely, that such a construction of the law works a violation of defendant's right under the fourteenth amendment of the constitution of the United States—was not presented to this court for consideration. Being now so presented, since the supreme court of the United States has repeatedly decided that corporations are within the protection of that amendment, the question must be considered in the light of this claim of right.

It has already been said that no valid reason can or has been shown why a distinction in the place of trial should be made, and the distinction has been supported solely upon the authority of the language of our constitution. Since it is beyond question that the constitution of this state cannot be made to yield to the force of any legislative enactment, it would follow that if there were no way of harmonizing the provisions of section 392 of the Code of Civil Procedure and section 16 of article XII of our constitution, the necessary result of a conflict would be that the former would fall. But upon the other hand, if reasonably possible, a harmonious adjustment of the two provisions will be found. The language of the constitution itself presents a ready solution of the difficulty. It declares that corporations may be sued in the county of their principal place of business, "*subject to the power of the court to change the place of trial, as in other cases.*" As the power of the court to change the place of trial rests entirely upon legislative enactment, it follows that here in the constitution itself is a distinct permission to the courts to change the place of trial in accordance with legislative enactment. The constitutional provision is therefore as though it had read, "Any and all actions may be commenced against corporations in the county of the principal place of business of the corporation, provided, however, that the courts may change the place of trial of such actions in accordance with the laws governing such places of trial." So construed, all our laws touching change of venue and place of trial become uniform and harmonious. The right still remains to a plaintiff to commence his action in the county of

the principal place of business, and the right remains to the corporation to have the place of trial changed under exercise of the court's power in enforcing the legislative enactments in regard thereto.

It follows herefrom that the defendant was entitled to have the place of trial of the action changed to Kern County under the provisions of section 392 (subd. 1) of the Code of Civil Procedure. We have not in the foregoing overlooked the language of this court in *Lewis v. South Pacific Coast R. R. Co.*, 66 Cal. 209, [5 Pac. 79], where in a single sentence it is said, referring to the section of the constitution which has been under consideration, "Nor are we able to see wherein the provision of the state constitution in question conflicts with the provision of the fourteenth amendment to the constitution of the United States." But this declaration cannot be considered as authority. It was given in 1884, at a time when this court had held that corporations were not persons within the meaning of the fourteenth amendment to the constitution of the United States, and were, therefore, not within the protection of that amendment. (*Central Pacific R. R. Co. v. State Board of Equalization*, 60 Cal. 35.) It was not until 1886 that the supreme court of the United States first declared corporations to be entitled to the protection of that amendment. (*Santa Clara County v. Southern Pacific R. R. Co.*, 118 U. S. 394, [6 Sup. Ct. 1132]; Guthrie on the Fourteenth Amendment, p. 53.) The language of this court in *Lewis v. South Pacific Coast R. R. Co.*, 66 Cal. 209, [5 Pac. 79], while sustainable in the then condition of the law, can, in the light of the subsequent decisions of the supreme court of the United States, no longer be supported.

Appellant's reliance upon section 5 of article VI of the constitution, which provides that "all actions for the recovery of the possession of" or "quieting the title to . . . real estate, shall be commenced in the county in which the real estate . . . is situated," is not well founded. It may not be said that this is an action either for the recovery or possession or for quieting title to real estate.

For the foregoing reasons the order refusing a change of venue of the action is reversed.

Lorigan, J., McFarland, J., Shaw, J., and Angellotti, J., concurred.

[S. F. No. 3741. In Bank.—February 7, 1907.]

**MAMIE C. BACON, Respondent, v. FRANK PAGE BACON
et al., Appellants.**

DECREE OF DISTRIBUTION—RELIEF IN EQUITY—FRAUD OR MISTAKE—ENFORCEMENT OF TRUST.—A decree of distribution of the estate of a deceased person is subject to review in equity upon a showing that it was procured by extrinsic fraud or mistake, whereby the court and the losing party were imposed upon or misled; and an involuntary trust may be enforced against the parties who have thereby obtained an inequitable advantage.

ID.—EQUITY JURISDICTION NOT AFFECTED BY CONCLUSIVENESS OF DECREE—POWER OF LEGISLATURE—CONSTRUCTION OF CODE.—It is not within the power of the legislature to divest the jurisdiction in equity cases conferred by the former constitution upon the district court, and by the present constitution upon the superior court as succeeding to the equity jurisdiction of the district court, and that jurisdiction could not be divested or affected by section 1686 of the Code of Civil Procedure, making the decree of distribution conclusive as to the rights of heirs, legatees, or devisees. That section should be construed so as to make it constitutional, if reasonably possible; and it may be reasonably interpreted to mean that it should have merely the same force and effect as other final judgments, which are subject to any form of direct attack allowed by law or by independent suit in equity.

ID.—DIRECT ATTACK IN EQUITY.—A suit in equity to review a judgment for fraud or mistake is a direct proceeding against the judgment, and not a collateral attack.

ID.—REMEDY BY MOTION NOT EXCLUSIVE.—The remedy by motion, under section 473 of the Code of Civil Procedure, within six months after judgment, to be relieved therefrom, when taken against the moving party, through his mistake, surprise, or excusable neglect, though it may include mistake superinduced by fraud of the other party, is merely cumulative, and does not exclude or displace the remedy in equity, nor is it an adequate substitute therefor.

ID.—EQUITABLE RELIEF INCLUSIVE OF MISTAKE.—The power of a court of equity to relieve against judgments is not confined to cases where they have been procured by fraud, but extends also to judgments wrongfully given by reason of mistake either of the court or of the injured party unmixed with fraud, and not the result of the negligence of the injured party.

ID.—MISTAKE IN LEGACY DISTRIBUTED—INCORRECT COPIES OF WILL—RELIEF IN EQUITY—TRUST.—Where the probated will in fact gave to plaintiff a legacy of ten thousand dollars, but by mistake of a copyist of the will typewritten copies thereof were furnished in

which "ten" was mistaken for "two," and the will was represented to all parties and to the court as giving a legacy of only two thousand dollars, and through said mistake, unmixed with negligence of the plaintiff, a legacy of two thousand dollars only was distributed to plaintiff, and the remaining eight thousand went to the residuary legatees, plaintiff may enforce a trust against them and those in interest in the stock of a corporation organized to take their residuary estate.

ID.—RELIANCE UPON STATEMENTS OF PERSONS IN FIDUCIARY RELATIONS.

—Where the plaintiff, relying upon the statement of her husband and of the executors, who were also residuary legatees, that the legacy to her was in the sum of two thousand dollars, failed to appear at the distribution, her reliance upon the statements of those who then stood in fiduciary relations to her could not be charged to her as negligence.

ID.—TRUST RELATIONS OF EXECUTORS.—Executors occupy trust relations toward the legatees, and are bound to the utmost good faith in their transactions with the beneficiary.

ID.—EXTRINSIC FRAUD OR MISTAKE—GRAVAMEN OF RULE—ADJUDICATION OF TECHNICAL ISSUE.—The gravamen of the rule as to extrinsic fraud or mistake lies in the fact that thereby "the unsuccessful party has been prevented from exhibiting fully his case," and consequently that there has been "no adversary trial or decision of the issue," or "no fair submission of the controversy." Where the unsuccessful party has been thus hindered, he is not to be refused relief on the ground that the fact on which his defense or claim in the original action depended, and by which he expects to bring about a different result in the new suit for equitable relief, was technically in issue in the original action or proceeding, or was necessarily decided by the court in that action, and concluded by the judgment beyond reach on collateral inquiry.

ID.—LACHES NOT SHOWN—STATUTE OF LIMITATIONS—DISCOVERY OF MISTAKE.—Where no independent laches was shown, which could have prejudiced the defendants, and nothing appears to have put the plaintiff upon inquiry prior to the actual discovery of the mistake, the statute of limitations only began to run from the time of such discovery.

ID.—EVIDENCE—INTRODUCTION OF ORIGINAL WILL TO SHOW MISTAKE.—In the suit in equity which involves a direct attack upon the judgment on the ground of the mistake, the original will was properly introduced in evidence to establish the mistake and the right of the plaintiff, and to show the injury resulting to her from the erroneous distribution.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

B. Brent Mitchell, and John A. Percy, for Appellants.

Bishop & Wheeler, and W. W. Deamer, for Respondent.

SHAW, J.—On January 19, 1893, Henry D. Bacon died, leaving surviving him his widow, Julia A. Bacon, and three children,—namely, Frank Page Bacon, Ella Etta Bacon Soule, and Carrie Jennie Bacon. His will was duly admitted to probate on March 13, 1893. By its terms the bulk of the testator's property, after payment of debts, was bequeathed to his three children aforesaid. It contained the following clause, out of which this litigation arises, to wit: "If my said estate is worth as much as two hundred and fifty thousand dollars, at my death after payment of liabilities as aforesaid I desire that my legal representatives shall pay to the wife of my said son Frank the sum of ten thousand dollars and to the husband or husbands of my said daughters Ella Etta and Carrie Jennie each the sum of ten thousand dollars." The plaintiff, at that time, was the wife of said son Frank. The estate was worth much more than two hundred and fifty thousand dollars, and she was therefore entitled to the legacy of ten thousand dollars. The three children were appointed executor and executrices of the will and duly qualified and acted as such. Shortly after the testator's death, and before the will was probated, the children and other parties interested, except the plaintiff, met for the purpose of reading the will. In reading it, by mistake the word "ten" was read as "two" where it occurs in the above-quoted clause. This mistake was carried into all the subsequent proceedings, was not perceived by any of the interested parties or any person concerned in the administration, the respective legacies were paid as legacies of two thousand dollars each, and that sum was accepted and receipted for as payment in full by the plaintiff, all parties then believing that the legacies were each for two thousand dollars only, and a petition for distribution was thereafter filed, notice thereof duly given, and a decree of final distribution of the estate made on December 18, 1896, reciting the said legacy as a legacy for two thousand dollars, declaring its full payment and distributing the residue to the defendant, Bacon Land and Loan Company, a corporation

organized to receive and hold the property of the estate, to which said residuary legatees had theretofore conveyed their respective interests in exchange for a proportionate amount of the corporation stock. It is also claimed that this decree was obtained by fraud as well as by reason of the mistake above mentioned.

This suit was begun on July 31, 1899, against the residuary legatees above named, both in their individual and representative capacities. The widow and the said corporation are also made parties defendant. The object of the action is to obtain a judgment declaring that the legacy bequeathed to plaintiff by the will was ten thousand dollars; that of that sum eight thousand dollars, with interest, remains unpaid; that the decree of distribution with respect to the recitals that the legacy was two thousand dollars and was satisfied be held void; that the said sum of eight thousand dollars and interest be declared a lien and charge on the property of said estate so distributed to said corporation, or on the stock of said corporation issued to said legatees in exchange for said property, in case the property could not be charged; that said property or stock be declared to be held in trust for plaintiff, so far as may be necessary for the payment of the said balance with interest; and that if not paid, then that said property be sold and payment made out of the proceeds.

The court gave judgment substantially as prayed for against the three residuary legatees, declaring said balance and interest a lien and charge on the stock of said corporation belonging to them, and that they held said stock in trust for the plaintiff, so far as should be necessary for the payment of the balance, enjoining any transfer by them and providing for its sale to satisfy said lien. It also gave personal judgment against said legatees in favor of plaintiff for the amount of said balance and interest and declared her receipt for full payment canceled. The court refused to declare a lien or charge against the property of the estate held by the corporation, and gave judgment in favor of said corporation for its costs. From this judgment and from an order denying their motion for a new trial the said Frank Page Bacon, Ella Etta Bacon Soule, and Carrie Jennie Bacon appeal.

There is also an appeal by the same parties as personal representatives of the deceased Henry D. Bacon, they having

never been discharged from that trust. There is no judgment against them in that capacity, except so far as the judgment declaring void the recitals in the decree and canceling the receipts may be so construed. Their interests in that capacity are concerned only so far as that part of the judgment may require further proceedings in the administration of the estate. This appeal has not been argued by either party and need receive no further consideration here.

The first proposition of the appellants is that the superior court had no jurisdiction of the subject-matter of the action. The complaint states a cause of action of the class formerly cognizable in equity and now within the jurisdiction of the superior courts by virtue of the constitutional grant to those courts of "original jurisdiction in all cases in equity." (Art. VI, sec. 5.) The appellants claim that decrees of distribution constitute an exception to the general rule, and cannot be reviewed in equity upon the ground of fraud or mistake.

1. The proposition that a decree of distribution is subject to review in equity upon a showing that it was procured by fraud or mistake appears to be settled by the decisions of this court in *Baker v. O'Riordan*, 65 Cal. 368, [4 Pac. 232]; *Sohler v. Sohler*, 135 Cal. 323, [87 Am. St. Rep. 98, 67 Pac. 282]; *Estate of Hudson*, 63 Cal. 457; *Dean v. Superior Court*, 63 Cal. 478; *Winegerter v. Winegerter*, 71 Cal. 110, [11 Pac. 853]; and *Buckley v. Superior Court*, 102 Cal. 10, [41 Am. St. Rep. 135, 36 Pac. 360]. In *Baker v. O'Riordan*, 65 Cal. 368, [4 Pac. 232], a decree of distribution to the defendant had been obtained by the consent of an attorney, who, fraudulently and without authority, appeared for Baker, who was entitled as husband of the decedent. It was a case of the kind described in *United States v. Throckmorton*, 98 U. S. 65, as a case, "where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat," and which is classed therein as among the instances of fraud for which a new suit would be sustained to set aside the judgment so obtained. In regard to the jurisdiction this court, in *Baker v. O'Riordan*, said: "The equitable jurisdiction to cancel and set aside or to restrain judgments and decrees of any court obtained by a fraud practiced upon the court and the losing party, is well settled and familiar" (2 Pomeroy's Equity Jurisprudence, 919). . . . We have no doubt of the right

of the plaintiff under the findings, to have the decree assigning his share of the estate of his wife to the defendant canceled and set aside." In *Sohler v. Sohler*, 135 Cal. 323, [87 Am. St. Rep. 98, 67 Pac. 282], the plaintiff sued to set aside a decree of distribution induced by the fraud of the defendants, coupled with the mistake or ignorance of the plaintiff, the ignorance being also the result of the fraud. The court below had sustained a demurrer to the complaint. The supreme court reversed the judgment, held that the superior court had jurisdiction of the action and power to review the decree of distribution, and to declare that the defendants held as involuntary trustees of the plaintiff the property improperly vested in them by the decree. This is substantially the same relief as that given in the case at bar. The other cases above cited contain declarations similar in effect to the above quotation from *Baker v. O'Riordan*, and, although they may be *obiter dictum*, we think they correctly state a settled rule of equity jurisprudence.

The decisions cited by the appellants are not in conflict with these conclusions. In *Langdon v. Blackburn*, 109 Cal. 19, [41 Pac. 814], it seems to have been conceded that while the probate of a will could not be reviewed in equity, a decree of distribution was subject to such attack in a proper case of extraneous or collateral fraud, and it was held that the showing of such fraud in that case was insufficient. *William Hill Co. v. Lawler*, 116 Cal. 360, [48 Pac. 323]; *Jewell v. Pierce*, 120 Cal. 79, [52 Pac. 132]; *Cunha v. Hughes*, 122 Cal. 111, [68 Am. St. Rep. 27, 54 Pac. 535]; and *McKenzie v. Budd*, 125 Cal. 600, [58 Pac. 199], were collateral attacks upon decrees of distribution, and they simply announce that the well-known rule protecting judgments against collateral attack, except for want of jurisdiction, is applicable to such decrees. They have no bearing on the question. *Good v. Montgomery*, 119 Cal. 552, [63 Am. St. Rep. 145, 51 Pac. 681], and *In re Trescony*, 119 Cal. 568, [61 Pac. 951], merely decide that the decree of distribution supersedes the will, and that so long as the decree stands unreversed by any direct attack the will cannot, in any collateral inquiry, be used to impeach the decree. *Toland v. Earl*, 129 Cal. 148, [79 Am. St. Rep. 100, 61 Pac. 914], was an action in the superior court to construe a will and obtain a decree directing the same

court as to the manner in which it should distribute the estate then in course of administration in that court. It was held that such a proceeding in equity was no longer necessary; that the same relief could be obtained from the same court in the regular course of the probate proceedings; that the former jurisdiction of equity was now exercised through the same court by means of the proceeding for distribution, or a proceeding under section 1664 of the Code of Civil Procedure, which were made the exclusive modes of obtaining a judicial construction of a will. *Lynch v. Rooney*, 112 Cal. 282, [44 Pac. 565], was an attempt to review a decree of distribution and declare an involuntary trust, upon a showing that the decree was procured by false or mistaken testimony. The case is one of the class where the fraud or mistake is intrinsic. In such cases no relief can be given. (*Pico v. Cohn*, 91 Cal. 133, [25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537]; *United States v. Throckmorton*, 98 U. S. 65.) If the latter part of the opinion in this case was intended to declare that such decrees may not be reviewed for extrinsic fraud in procuring them to be made, it must be considered as overruled by the decision in *Sohler v. Sohler*, 135 Cal. 323, [87 Am. St. Rep. 98, 67 Pac. 282]. In *Mulcahey v. Dow*, 131 Cal. 73, [63 Pac. 158], the opinion concedes that a distributee may in a proper case be held as an involuntary trustee, but decides that the fraud there shown was not extrinsic or collateral.

It is urged, with respect to the jurisdiction, that decrees of distribution, being a part of the same probate proceeding as the decree probating the will, must be governed by the same rule, and that, as in *State v. McGlynn*, 20 Cal. 231, 262, [81 Am. Dec. 118], and *Kieley v. McGlynn* (Broderick's will), 88 U. S. 503, it was decided that decrees probating wills are not subject to review in equity for fraud or mistake, it would follow that a decree of distribution cannot be so reviewed. In view of the decisions we have cited to the contrary, this proposition is clearly untenable. Furthermore, the rule denying such power to review the probate of a will, while it is declared by the above decisions, and perhaps by the greater number of decisions elsewhere, is universally admitted to be an exception to the general rule that all final judgments are subject to such attack. The reasons given in support of the exception are generally declared in the opin-

ions to be unsatisfactory and illogical, and the discussions usually end with the statement that, whether for good reasons or not, the exception is firmly established and upon that ground must be adhered to. An exception so poorly supported by reason should not be extended to a new class of cases.

2. It is further claimed that such review is prohibited by the provisions of section 1666 of the Code of Civil Procedure, which on this point are as follows: "In the order or decree, the court must name the persons and proportions or parts to which each shall be entitled. . . . Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal." The proposition proves too much. It necessarily concedes that such jurisdiction is conferred by the constitution, and would remain in the superior court but for this statute, which is supposed to divest it. The legislature does not possess power to divest the court of its constitutional jurisdiction. It may change the practice or procedure, the mere method by which the jurisdiction is exercised (*Ex parte Harker*, 49 Cal. 467), but it cannot take away the jurisdiction entirely, nor substantially impair it. No adequate new procedure has been provided for the exercise of this jurisdiction, and, if it exists at all, it must be exercised by the long-established method of an independent suit.

It is true that section 473 of the Code of Civil Procedure provides that upon motion in the same cause or proceeding, instituted within six months after judgment, a party may be relieved from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. This would undoubtedly also include mistake superinduced by the fraud of the other party, and it does provide a new method whereby some relief can be obtained on motion, similar to that here sought by an independent suit. But this provision has never been considered as an exclusive method for the exercise of the equity jurisdiction, nor as an adequate substitute for the right to proceed by action. It is a cumulative remedy, and does not displace the remedy in equity. (*Baker v. O'Riordan*, 65 Cal. 368, [4 Pac. 232].) We have recently held not only that it does not displace the equitable remedy, but also that an adverse decision on such a motion does not

necessarily bar a subsequent suit to vacate the judgment for the same cause. (*Estudillo v. Security L. and T. Co.*, 149 Cal. 556, [87 Pac. 19]. Also, *Freeman on Judgments*, sec. 511; *Simpson v. Hart*, 14 Johns. 63; *Wistar v. McManus*, 54 Pa. St. 318, [93 Am. Dec. 700].) It follows that the jurisdiction still remains, notwithstanding the provisions of that section.

It is suggested that at the time the present constitution was adopted section 1666 was in force, and that its effect was that courts of equity were thereby deprived of jurisdiction to vacate decrees of this class, that the jurisdiction in equity conferred by the constitutional grant must be understood to include only the jurisdiction as then existing and as limited by that section, and, hence, that it did not include the power to vacate judgments in cases of this class. To this there is a sufficient answer. The grant of this jurisdiction is not a new provision. It was conferred upon the district courts by the constitution of 1849, in identical language, and this had been construed to give that court the same jurisdiction as that formerly possessed by the equity courts. (*Sanford v. Head*, 5 Cal. 298; *People v. Davidson*, 30 Cal. 391; *Rosenberg v. Frank*, 58 Cal. 400.) In *Sanford v. Head*, 5 Cal. 298, it was held that this jurisdiction included power to set aside a judgment for fraud, and in *Baker v. O'Riordan*, 65 Cal. 368, [4 Pac. 232], this doctrine was applied to a decree of distribution. Hence, this provision of section 1666, if we consider that it was intended to divest a part of this equity jurisdiction, must have been unconstitutional and void in 1866, when it was first enacted. (Stats. 1865-1866, p. 767.) The constitution of 1879 gave the jurisdiction to the superior court by the use of the same language as that of 1849, and it must be construed to have the same effect. The effect of the words used cannot be changed and the jurisdiction limited by reference to a void statutory provision having only a nominal existence at the time of the adoption of the new constitution. The grant of jurisdiction in all cases in equity made in 1879 was of the same effect as the similar grant in 1849, and conferred upon the superior courts the jurisdiction previously vested in the district courts, and, therefore, it was unaffected by the void statute.

We think, however, that section 1666 was not intended to have the effect claimed. A statute should be so construed as to make it constitutional, if it is reasonably possible. (*People v. Frisbie*, 26 Cal. 139; *French v. Teschemaker*, 24 Cal. 554.) The provision may reasonably be interpreted to mean no more than that the decree of distribution should have the same force and effect as other final judgments,—that is to say, that it should not be subject to collateral attack, but only to direct attack on appeal, or as otherwise provided by law. This construction was in effect given to it by the decision in *De Pedrorena v. Superior Court*, 80 Cal. 144, [22 Pac. 71]. The rigid construction contended for would as completely cut off the power of the court to vacate such decree upon proceedings by motion under section 473 of the Code of Civil Procedure as it would the power of review by a suit in equity. Yet in that case it was held that the court had power to set aside a decree of distribution, on motion under section 473, begun within six months after its rendition, notwithstanding the provision of section 1666 aforesaid. Thus, in effect, it declared that the latter section does not exclude any form of direct attack. A suit to review a judgment for fraud or mistake is a direct proceeding against such judgment, and not a collateral attack. (*Bergin v. Haight*, 99 Cal. 56, [33 Pac. 760].)

We conclude that the provisions of section 1666 do not prevent a review of a decree of distribution by a suit in equity, in a proper case.

3. It is urged that the power to review judgments extends only to cases where they have been procured by fraud, and that it does not exist with respect to a judgment wrongfully given by reason of mistake either of the court or of the injured party. No such distinction is recognized by the authorities. The text-books all declare that such relief can be given where the former judgment was the result of a mistake unmixed with fraud, and not the result of the negligence of the injured party. (Black on Judgments, sec. 381; 2 Freeman on Judgments, sec. 500; 2 Story's Equity Jurisprudence, sec. 885; 2 Beach on Injunctions, sec. 701; 2 Pomeroy's Equity Jurisprudence, sec. 871; 3 Pomeroy's Equity Jurisprudence, sec. 1376, 1377; 16 Am. & Eng. Ency. of Law, p. 383; 1 High on Injunctions, sec. 209 et seq.) Indeed, the cases on the

subject of mistake allow relief from a judgment where the subject-matter of the mistake approaches more closely the actual merits of the former inquiry than in cases of fraud. In *Quivey v. Baker*, 37 Cal. 465, and *Busey v. Moraga*, 130 Cal. 588, [62 Pac. 1081], a mortgage by mistake described a lot not owned by the mortgagor, instead of the one intended. It was foreclosed and the same mistake was inadvertently carried into the judgment, the sale, and the sheriff's deed. It was held that an action would lie to correct all the mistakes, including the mortgage, the judgment, and the deed. In *Gerig v. Loveland*, 130 Cal. 512, [62 Pac. 830], one who held two mortgages for the same debt, by mistake foreclosed the first alone, which covered less property than the second, and was insufficient to pay the debt. The court declared that he could maintain an action to cancel the first decree, and to foreclose the second mortgage against a subsequent judgment creditor, thus avoiding the bar of section 726 of the Code of Civil Procedure, allowing but one action on a debt secured by mortgage. In *Merrill v. Bank*, 94 Cal. 59, [29 Pac. 242], a judgment by default was rendered against two makers of a note. One of them afterwards discovered that the note had been fully satisfied by the other before the suit was begun. An action by him to set aside the judgment, or to have it declared satisfied as to him, was sustained, it appearing that he was not negligent in failing sooner to discover the defense. *Ford v. Ford*, 1 Walk. (Miss.) 505, [12 Am. Dec. 587], is substantially to the same effect. In *Cohen v. Dubose*, 1 Harp. Eq. 102, [14 Am. Dec. 709], there was a trial by jury in an action at law on a note. The note was given in evidence and the jury returned a verdict for plaintiff for the amount of the principal thereon, the interest being omitted by their mistake. It was held that the plaintiff could maintain a suit in equity to correct the mistake and compel payment of the interest, and that the testimony of the jurors could be introduced in proof of the mistake. Chief Justice Marshall, in *Marine I. and S. Co. v. Hodgson*, 7 Cranch, 336, states the rule thus: "It may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by

fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of equity. On the other hand, it may with equal safety be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law."

We are satisfied that the court below had power to entertain the suit and give the relief awarded by the judgment appealed from. It remains for us to consider the case upon its merits.

4. A photographic copy of the will is inserted in the record. Upon a casual reading a person of ordinary skill in deciphering penmanship might easily mistake the word "ten," in the two places where it appears therein, for the word "two," and believe that the legacies were each for two thousand dollars. But upon a careful reading, and especially upon a comparison with the formation of the same letters in other parts of the will, and without the aid of a microscope, no person of experience could doubt that the word is "ten," and that the legacies are each for ten thousand dollars and not for two thousand dollars. Without doubt the testator did bequeath to the plaintiff a legacy of ten thousand dollars. The original will was filed and probated as it was written by the testator, and, consequently, the estate exceeding two hundred and fifty thousand dollars, the probate of the will clearly established that the plaintiff was entitled to a legacy of ten thousand dollars.

At the time of the first reading of the will, when the words "ten" were erroneously read by all parties present as "two," the attorney of the executors was present, and was directed by them to have typewritten copies of the will made and sent to the parties interested. This was immediately done, the copyist by mistake writing the amount of the legacy as "two thousand dollars." Thereafter these copies were used in the subsequent proceedings, and the original will was not again carefully read or examined by any person until some three years after the estate was distributed. Thus the mistake was perpetuated and repeated in the final decree. The plaintiff did not expect that any legacy would be left to her, and did not know that anything was given to her by the will, until she

was informed by her husband shortly after the first reading thereof. He told her that it gave her a legacy of two thousand dollars. A day or two later she received the copy from the executors, which gave her the same information. She had every reason to believe that the information was correct. It came from those on whom she had a right to rely. We may presume that she had been accustomed to rely on her husband, and had found him trustworthy. She did rely on them, and believed that the legacy was in fact two thousand dollars, and during the whole course of the administration she had no occasion for even a suspicion that it was otherwise. Under these circumstances the court properly found that she cannot be charged with neglect in failing to discover the mistake.

Furthermore, the information came from persons occupying fiduciary relations toward her. Her husband first informed her, and she then received the copy from the executors. Afterwards, and before the petition for distribution was filed, upon her request for payment of the supposed balance of her legacy, the individual defendants in their representative capacity, prepared a receipt in full, in effect stating therein that the balance of the principal of her legacy was but fifteen hundred dollars (five hundred dollars having been previously paid), which they presented to her and demanded that she should sign upon payment of said balance, which she did, and the supposed balance was then paid by them to her. This was equivalent to a statement by them that her legacy was but two thousand dollars. Executors occupy trust relations toward the legatees, and are bound to the utmost good faith in their transactions with the beneficiary. (1 Story's Equity Jurisprudence, sec. 218; *Robins v. Hope*, 57 Cal. 497.) They were also residuary legatees, and hence whatever was lacking in full payment to the plaintiff was so much gained to them. They are therefore not in any position to claim that the plaintiff, in relying on their own statements regarding the amount of the legacy, was lacking in diligence.

At the hearing of the petition for distribution the original will, in the handwriting of the testator, was on file, but it was not produced, examined, or read by or to the court. The petition was prepared from one of the typewritten copies of the will. It stated the legacy as for two thousand dollars,

ties so long as it stands unrevoked and unaffected by any direct attack, not only as to the facts actually in issue, but also as to all facts not in issue, but which might constitute a possible defense, and because it is therefore injurious, that there is ground for the interposition of equity to give this form of relief. To deny relief where the fact is technically in issue, though, by reason of the mistake or fraud, not controverted or contested at the trial or hearing, would be to destroy the equitable remedy in a large class of cases in which it has been hitherto administered.

The case at bar comes fully within these principles. The plaintiff, by reason of the common mistake, believed that her legacy was only two thousand dollars, instead of ten thousand dollars, as it was in fact. She had been fully paid the two thousand dollars, which she believed to be the extent of her demand. Her claim was, as she supposed, satisfied, and she was thereby fully justified in assuming that she had no further concern with the estate and no interest in the distribution. As we have seen, the mistake was not caused by her culpable negligence. In this state of mind she would properly consider that she should not appear in the proceeding in which she had no interest. One who has no defense to an action against him, or no interest in a proceeding in which he is cited, is not negligent or chargeable with laches in failing to appear therein, but is thereby doing his legal duty to the court. The plaintiff testified, in substance, that if she had not been misinformed in regard to the amount of her legacy, she would have made inquiry about it. The court below was justified by the circumstances disclosed by the evidence, as well as by this direct testimony, in finding that by reason of her mistake as to the contents of the will the plaintiff was induced to refrain from appearing in the proceeding for distribution and there contesting the statement that her legacy was but two thousand dollars, and claiming the true amount thereof. It is therefore a fact that by reason of this mistake she was prevented from exhibiting fully her case, and that, as the result, there was no adversary trial, no real contest, and no fair submission of the question whether her legacy was two thousand dollars or ten thousand dollars. The obvious result was the decision of the court, based on the uncontested facts set forth in the petition for distribu-

tion, that the plaintiff had been paid in full, with the corresponding decree distributing to the residuary legatees eight thousand dollars of the money of the estate which of right belonged to the plaintiff. The mistake of the plaintiff which led to this injury, was clearly caused by matters extraneous and collateral to the merely formal inquiry made by the court upon the hearing.

The court further found that her failure to appear was induced by both the actual and constructive fraud of the defendants. We do not find it necessary to consider the sufficiency of the evidence to support these respective findings of fraud. There is sufficient proof of mistake, as we have shown, and the judgment is fully sustained by the findings on that subject.

The plaintiff was not guilty of neglect or laches in the delay in beginning the present action. She did not discover the mistake until a short time before the action was begun. We do not find anything in the evidence which would necessarily put her on inquiry as to the amount of the legacy, or cause her to suspect that there had been a mistake concerning it. The dissensions between herself and her husband, and their consequent separation, occurring shortly before the time of the last payment upon the legacy, and the subsequent divorce, had no reference to the legacy or to the will, and were not of a character to arouse in her a suspicion that her previous information from him concerning it was false, or to raise a doubt of the good faith of the other defendants. She testified that she had no such doubt or suspicion. The delay does not appear to have been in the least injurious or prejudicial to the defendants in respect to their defense in this action, or in any other respect, and, therefore, one element of laches, as distinguished from the bar of the statute of limitations, is wanting. (*Cahill v. Superior Court*, 145 Cal. 47, [78 Pac. 467]; *Mayer v. Mayor*, 63 N. Y. 455; *Lawrence v. American Nat. Bank*, 54 N. Y. 432; *Nat. Bank of Commerce v. Nat. Mechanics' Bank*, 55 N. Y. 211, [14 Am. Rep. 232]; *Snyder v. Ives*, 42 Iowa, 157; *United States Bank v. Georgia*, 10 Wheat. 333, 349.)

The action was not barred by the statute of limitations. The plaintiff had no actual knowledge of the mistake prior to the distribution, nor until the accidental discovery, shortly

before the action was begun. The statute did not begin to run until that discovery occurred. The causes which produced the cessation of the intimate relations between plaintiff and the defendants did not put plaintiff upon inquiry to the extent necessary to charge her with constructive notice of the mistake prior to the actual discovery. The differences between them, as we have stated, would not necessarily affect her confidence in the honesty and integrity of the defendants in respect to the administration of the estate.

There are other particulars wherein it is claimed that the evidence does not sustain the findings, but it is not necessary to discuss them in detail. A careful consideration of the evidence in the record satisfies us that it is sufficient to prove all the facts necessary to support the judgment.

The will was competent evidence to prove the mistake, the right of the plaintiff, and the injury to her from the erroneous distribution. Decisions holding that a will is not admissible on collateral inquiry, after probate and distribution, to prove that it was disregarded, or incorrectly construed, by the court in making distribution of the estate, have no application here. This is not a collateral attack on the decree of distribution. It is a direct attack thereon. (*Bergin v. Haight*, 99 Cal. 56, [33 Pac. 760].) In such direct proceedings to impeach the decree the will is competent evidence to prove the error and the injury. It is unnecessary to discuss the other errors of law assigned. They are either not well taken, or they do not affect the result.

The judgment and order are affirmed.

Angellotti, J., Sloss, J., McFarland, J., Lorigan, J., and Henshaw, J., concurred.

[S. F. No. 3744. In Bank.—February 7, 1907.]

**FRANK SOULE, Respondent, v. FRANK PAGE BACON
et al., Appellants.**

DECREE OF DISTRIBUTION—RELIEF IN EQUITY—MISTAKE IN AMOUNT OF LEGACY—TRUST—SUPPORT OF FINDING AGAINST NEGLIGENCE.—In this action in equity to enforce a trust against residuary legatees and their interest in a corporation organized by them to take their residuary interest under a decree of distribution, on the ground of mistake in the decree to the injury of plaintiff, under the same facts shown in case No. 3741, *ante*, p. 477, with additional facts tending to show some degree of negligence on the part of plaintiff in failing to discover the mistake prior to the decree, but not so marked or inexcusable as to overcome the implied finding of the court to the contrary, or to show that the opposing parties were thereby prejudiced, the decision of the court in favor of the plaintiff will be affirmed.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. Samuel P. Hall, Judge.

The facts are stated in the opinion of the court.

R. B. Mitchell, for Appellants.

Bishop & Wheeler, and W. W. Deamer, for Respondent.

SHAW, J.—This was an action by the plaintiff to declare the defendants involuntary trustees of the plaintiff with respect to the sum of eight thousand dollars belonging to the estate of Henry D. Bacon, deceased, which is claimed by plaintiff as the balance of a legacy given to him by the last will of said deceased, but which, by the decree of final distribution of said estate, was distributed to a corporation organized by the defendants to take and hold the property for their benefit. Judgment was given for plaintiff in the court below. The defendants appealed from the judgment and from an order denying their motion for a new trial.

The case is, in all important particulars, identical with the case of *Bacon v. Bacon*, decided concurrently with this case. (*Ante*, p. 477, [89 Pac. 317].) The parties defendant are the

same and the case depends on the same clause in the will of Henry D. Bacon and involves the same mistake with respect to the word "ten" in that part of the clause relating to the husband of the defendant Ella Etta Bacon Soule. The plaintiff was the husband of said defendant, and as such he was given a legacy of ten thousand dollars by the will, but by reason of the mistake he received only two thousand dollars. An estrangement between the husband and wife occurred similar to that in the other case. The questions of law involved, and the facts and evidence also, are, with a few unimportant exceptions, of similar effect to those set forth in the aforesaid case of *Bacon v. Bacon*, and for the evidence, the facts, and the law of this case we refer to the opinion in that case, where they are elaborately stated and discussed. In this opinion we confine ourselves to a discussion of the exceptions.

Frank Soule, the plaintiff here, was present at the first reading of the will prior to its probate, and at that time, after it had been read aloud by the attorney for the executor and executrices, he took it in his hands for a moment and looked at it, but, not having on his spectacles at the time, he did not read it, but passed it on to the others. At that time, and while the persons interested were assembled in the presence of the executor and executrices appointed by the will, one of them voluntarily promised, on behalf of all, that they would prepare copies of the will and send one to each person receiving a legacy. A few days afterwards the plaintiff was presented with a copy of the will by his wife, who was an executrix, with the statement that it was the copy promised. Shortly afterwards he read in a newspaper a statement, purporting to give the substance of the will, in which the amount of his legacy was stated as ten thousand dollars. There was some conversation at that time between himself, his wife, and her sister, the defendant Carrie Jennie Bacon, in which the plaintiff and his wife both remarked that they supposed the newspaper statement regarding his legacy was a typographical error or an ordinary newspaper exaggeration. He never at any time had further cause to suspect that his copy of the will was not accurate or that his legacy was larger than two thousand dollars, or that the representatives of the estate were not dealing fairly and honestly with him. In all

other respects the present case is not materially different, in respect to the facts, from that of the plaintiff in the case of *Bacon v. Bacon*, ante, p. 477, [89 Pac. 317]. It is apparent in both cases, from the conduct of the parties, that all the interested persons had full confidence in the capacity and integrity of the attorney who read the will aloud at the meeting above mentioned. There never was any statement or intimation to the plaintiff, from any source, that the writing of the words in the will was at all difficult to decipher, or that any person who read it had any hesitation in pronouncing as "two" the word, which in fact was "ten," designating the number of thousands of dollars to be given to the plaintiff, unless it was given by the newspaper article above mentioned.

The facts here recited, when considered in connection with the facts appearing in the case of *Bacon v. Bacon*, aforesaid, do not require a decision at our hands different from that made in that case. The facts that all parties were mistaken in regard to the amount of the legacy is entirely clear. The only effect of the additional facts recited is to make a somewhat stronger case of negligence on the part of the plaintiff here in failing to discover the true amount of the legacy until after the decree of distribution. But with this additional evidence on the subject, the negligence of the plaintiff is not so marked and inexcusable that we can say that the implied finding of the court that the mistake, so far as he was concerned, was not caused by his inexcusable negligence, should be set aside and the case reversed. There are many cases holding that the party may have relief in equity from the consequences of his mistake of fact, although he was somewhat negligent in making the mistake, if his negligence in no way prejudiced the opposing party. (*Mayer v. Mayor*, 63 N. Y. 455; *Snyder v. Ives*, 42 Iowa, 157; *Lewis v. Lewis*, 5 Or. 170; *Capehart v. Mhoon*, 5 Jones Eq. 179; *Voorhis v. Murphy*, 26 N. J. Eq. 434.) Although this rule may not apply with full force to suits in equity to relieve a party from a judgment, nevertheless the failure of the plaintiff under the circumstances of the case to make an earlier discovery of the true amount due him was not negligence of such a character that it must be declared negligence in law, contrary to the implied finding of the court that it was not negligence.

At most, it was a question of fact for the court below to determine whether or not the lack of vigilance on the part of the plaintiff was such as would not have occurred with a man of ordinary care and prudence, under the same circumstances. That court has decided the question in favor of the plaintiff, and we are satisfied with its conclusion.

Some additional errors of law in the admission of evidence are assigned, but we do not think they are of sufficient importance to require discussion. The objections made were either properly overruled or the evidence elicited was of such slight importance that we cannot believe that the court below could have been influenced thereby in the least in coming to a decision.

The judgment and order are affirmed.

Angellotti, J., Sloss, J., McFarland, J., Lorigan, J., and Henshaw, J., concurred.

[S. F. No. 4436. In Bank.—February 7, 1907.]

In the Matter of the Estate of JEROME B. PAINTER,
Deceased. J. MILTON PAINTER et al., Appellants,
v. WIDOW AND SONS OF DECEASED, Respondents.

ESTATES OF DECEASED PERSONS—EFFECT OF WILL OF DECEDENT—GENERAL LEGACIES—SPECIFIC DEVISES AND LEGACIES—CONSTRUCTION OF CODE.—Under section 1360 of the Civil Code, read together with sections 1357, 1359, and 1362 thereof, specific devises and legacies given in the will of a decedent are free from any contribution to the payment of general legacies given therein.

ID.—TEST OF SPECIFIC DEVISES AND LEGACIES.—Though the definition of a specific legacy in section 1357 of the Civil Code refers in terms only to legacies, yet the question whether a testamentary gift is specific or general is to be determined by the same tests where the subject of the gift is real property as where it is personal property.

ID.—LAND SPECIFICALLY DEVISED TO RESIDUARY LEGATEES—PARTIAL DISTRIBUTION.—Where land definitely described and distinguished from all other parcels of land or property was devised to the residuary legatees in connection with a residuary devise and bequest to them of all other real and personal property not otherwise appropriated,

the land so described and devised must be deemed specifically devised, and a partial distribution thereof may be awarded to the devisees, as against general legatees.

ID.—QUESTION OF INTENT.—The question whether the testator intended to make a specific devise or bequest to those whom he has constituted his residuary legatees or the contrary is one purely of construction, to be determined from the language employed; and the question whether or not the testator at the time of the execution of the will and codicil had sufficient personal property to pay all the general legacies mentioned in the will is a circumstance bearing on his intent.

ID.—OWNERSHIP OF HALF-INTEREST IN FIRM.—Where there was sufficient evidence to show that the half-interest of the decedent in a firm was enough to pay the indebtedness and leave a surplus, which would be adequate to discharge the general legacies under the will, the devises of the real estate by specific description to the residuary legatees must be deemed specific.

ID.—EVIDENCE—STATEMENT BY TESTATOR.—A paper shown to be in the handwriting of the testator, purporting to contain a statement of the assets and liabilities of the partnership in which he owned one-half interest was competent evidence to show the testator's belief as to the status of the business.

APPEAL from orders of the Superior Court of the City and County of San Francisco refusing to compel payment of legacies and making partial distribution of real estate.
J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Pringle & Pringle, for Appellants.

M. B. Kellogg, and Francis J. Heney, for Respondents.

SLOSS, J.—Jerome B. Painter died on the sixth day of February, 1883, leaving a will and codicil, which were admitted to probate by the superior court of the city and county of San Francisco on the thirteenth day of April, 1883. The administration of the estate has been pending in said court ever since the last-mentioned date.

In March, 1898, J. Milton Painter, Theodore P. Painter, Adaline Mininger, Grace Mininger, J. Milton Painter, as executor of the will of Margaret Painter, deceased, Josephus Painter, by his guardian, J. Milton Painter, and Thomas B.

Cochran, claiming as legatees under the will, petitioned the superior court for an order requiring the executor and executrix to make payment of their legacies. The executor and executrix answered, setting up certain grounds of opposition to the prayer of this petition. At the same time the widow and sons of the decedent filed a petition asking for the partial distribution to them of certain real property belonging to the decedent. This petition was opposed by the parties who had asked for the payment of their legacies, and a hearing was had upon both applications together. The court made findings, and upon them denied the application of the first petitioners for payment of the legacies to them and granted the application of the widow and children for partial distribution. From both these orders appeals are now prosecuted.

Jerome B. Painter's will was executed on the eleventh day of March, 1864, while the codicil bore date March 11, 1874. The provisions of the will, so far as material to the present controversy, are as follows:—

“1st. I give and bequeath to my brothers, J. Milton Painter and Theodore P. Painter, all my share, right, title and interest of, and in and to, the copartnership of Painter & Co., the stock thereof, its business, good will, and all interests of whatsoever nature connected with them as partners (except real estate), debts due us, and moneys out at interest, for their own use and benefit, upon the express condition that they assume all debts standing against the concern, and pay off that certain mortgage on property southwest corner of Washington and Sansome streets.

“2nd. I also give and bequeath to them, my brothers, J. M. Painter and T. P. Painter, aforesaid, that certain building and lot of land in which our business has been conducted, known as Nos. 510 and 512 Clay Street, and more particularly described as being on Clay Street, commencing on the north side 73 feet west from Sansome Street, thence west 15.9x91.8 feet deep, with the proviso, that a certain mortgage on the same property, given by me to Miss Charlotte Rhodes for five thousand dollars as part of the purchase money, bearing interest at seven per cent per annum, will be assumed by them, both interest and principal, and paid as they may become due.

"3rd. I give and bequeath to my sons, Albert and Walter, that certain building and lot of land on Clay Street, known as Nos. 318, 320, and 322, and more particularly described as follows: [Here follows a particular description.] The property to be kept fully insured and in good repair from the moneys received from the rents thereof, and the building to be rented or let to the best advantage as well for the revenue to be derived from it, as for the future safety and well condition of the building and property. The balance of the rents, after paying the above necessary expenses, to be apportioned as follows: One sixth to be regularly sent to my mother, as her share, so long as she may live; and one sixth to my sister Adaline and brother Josephus, to be equally divided between them, so long as they may live, but should either die, then the sum apportioned to revert to my wife, as long as she remains my widow; but should she again marry, then to revert to my children, Albert and Walter. Should either of my children die, the whole of this property, and rents as apportioned, to go to the remaining one. The balance of the rents, viz.: two thirds to go to my wife, as long as she remains my widow, to be used for her support and maintenance, and that of my aforesaid children, and they to be properly educated with the best of a good English education; . . . The total rents of this property to revert to my children, as each becomes of age, namely, twenty-one years, to be used by them for their own particular benefit and free use, with my very particular injunction that they never see or know that their mother, aunts, uncles—more particularly their grand-parents, or their uncle, my brother Josephus—is in want of any of the necessities, comforts, or even ordinary luxuries of life, without their cheerfully and cordially administering to their wants. . . .

"4th. I give and bequeath to my beloved wife, and mother of my children, all my remaining property, as per schedule annexed, or which may be remaining, not in the schedule annexed, but unbequeathed, for her sole use and benefit.

"5th. I give and bequeath the sum of one thousand dollars each to the San Francisco (Protestant) Orphan Asylum, and the Ladies' Relief and Protection Society of San Francisco; also, one thousand dollars to my uncle, John H. Pearsol, of

Lancaster, Pennsylvania; and one thousand dollars to my niece, Grace (daughter of my sister Adaline), the latter sum to be placed out securely until she attains her lawful age (together with the interest accruing on the same) when she shall receive the said sum, principal and interest, for her sole use and benefit; but, in case of her death, the same to go to her mother, my sister Adaline. I also give and bequeath to my mother and sister Adaline, and brother Josephus, one thousand dollars each; also, one thousand dollars each to my brothers, J. Milton and Theodore.

“6th. I appoint as my executors to this my last will and testament, my wife, and my brothers J. Milton and Theodore, either or all of them to serve as they may wish, without the necessity of giving bonds or security whatever, as I have implicit faith in their integrity.”

At the time of the execution of this will the testator had only the two children, Albert and Walter, named therein. During the next ten years four more sons were born to him, and on March 11, 1874, as has been stated, he executed a codicil to his will reading as follows:—

“My sons Edgar, Arthur, Oscar and Jerome, being born to me since the making of the foregoing will, I hereby further will that they share and share alike with their brothers Albert and Walter in all properties held by me at the time of my death, and I hereby revoke the 2d clause of my will bequeathing to my brothers that property known as Nos. 510 and 512 Clay Street, between Montgomery and Sansome streets, San Francisco, and that it be placed for distribution among my sons when the youngest becomes of twenty-one years of age, like my other property mentioned herewith: All those certain parcels of land, with improvements, in south line of Washington Street, between Battery and Front streets, 20 feet x 60 feet deep, known as No. —. Also, southwest corner of Sansome and Washington streets, 45 10-12 feet x 67 feet; also, northeast corner of Powell and Filbert streets, 68 9-12 feet on Powell by 137 feet on Filbert Street; also, southeast corner of Powell and Jackson Streets, 48 feet on Jackson by 90 on Powell Street; also, lot on Broadway Street known as No. 729, 21 by 137½ feet, together with all real estate I may hereafter accumulate, as well as moneys at interest, etc., not otherwise appropriated.

"I also substitute my brother-in-law, Mr. R. B. Dallam, to act in place of my brother J. Milton Painter, as administrator to my will, without his giving bonds, etc. I also revoke clause 4th of this will and direct that my wife share with my sons, and they with her in all property, she one half and they all the other one half equally among them."

After the execution of the codicil and prior to the death of Jerome B. Painter a seventh son, Eugene, was born.

From the bill of exceptions, it appears that in a prior proceeding between the same parties the superior court made a decree (which has become final) construing this will and codicil. In any consideration that is now to be given to the terms of these instruments, the matters thus adjudicated are to be taken as conclusive, and to this extent the question before us is limited and narrowed. We shall point out hereafter the portions of that decree which have a bearing on the present controversy.

The legacies payment of which was sought by the appellants are those mentioned in paragraph 5th of the will, and the proportion of the rents bequeathed by paragraph 3d to the testator's mother, brother, and sister. The petitioner, Cochran, claims as assignee of John H. Pearsol. It is admitted here, although it was in issue in the lower court, that at the time of the hearing there was not in the hands of the executrix and executor sufficient personal property to pay the legacies bequeathed by paragraph 5th, and the main question for determination is whether these legacies are payable out of the real estate devised by the will and codicil, and distributed by the decree of partial distribution appealed from. If the legacies given by paragraph 5th of the will are chargeable against such real estate, the order denying the application for their payment and the decree distributing such real estate to the devisees are alike erroneous. (The rent bequests of paragraph 3d stand on a different ground and will be separately discussed.)

The contention of the respondents is that the real estate was specifically devised to them by the codicil, and that therefore such real estate is not chargeable with the payment of general legacies. As to how far, if it all, specific legacies or devises can be made to pay general legacies, the provisions of the Civil Code are by no means free from doubt. Section 1357 defines

the various kinds of legacies,—to wit, specific, demonstrative, annuities, residuary, and general. Section 1360 provides: "The property of a testator, except as otherwise specially provided in this code and the Code of Civil Procedure, must be resorted to for the payment of legacies in the following order: 1. The property which is expressly appropriated by the will for the payment of the legacies. 2. Property not disposed of by the will. 3. Property which is devised or bequeathed to a residuary legatee. 4. Property which is specifically devised or bequeathed." Taking this section alone, it would seem that, in the absence of any property embraced in one of the three classes first named in the section, property specifically devised or bequeathed should be resorted to for the payment of general legacies. Such rule would, however, be entirely contrary to the rule at common law, and in force, so far as we know, in all American jurisdictions. The respondent contends that the fourth subdivision of section 1360 should be read "Property which is *not* specifically devised or bequeathed," the word "not" having been, as is claimed, omitted by inadvertence. The point was discussed by this court to some extent in *Estate of Neistrath*, 66 Cal. 330, [5 Pac. 507], and the purport of the decision seems to be that, reading section 1360 together with sections 1357, 1359, and 1362, the effect of the various provisions is to make specific devises and specific legacies free from any contribution to the payment of general legacies. The question has not again been brought to the attention of this court, except in *In re Ratto's Estate*, 149 Cal. 552, [86 Pac. 1107], in which it is said: "In the *Estate of Neistrath*, 66 Cal. 330, [5 Pac. 507], the court leaves it somewhat doubtful whether by said section 1360 the legislature intended to subject specific devises to the payment of general legacies; but we need not consider that question here." While, as was said in the *Ratto* case, the former decision did leave the question somewhat doubtful, we think it was intended by the court in the *Neistrath* case to hold specific legacies or devises not chargeable with the payment of general legacies, and shall adhere to this construction of the code. It may be remarked that in this case it is expressly conceded by the appellants that "if this real estate is specifically devised these general legacies found in clause 5th of the will cannot be charged upon such real estate."

Section 1357 of the Civil Code declares that "A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator." While this definition refers in terms only to legacies, and not to devises, we have no doubt that in this state the question whether a testamentary gift is specific or general is to be determined by the same tests where the subject of the gift is real as where it is personal property. It is true that in England devises of real estate have always been regarded as specific. This resulted from the early statutory rule that a will disposed only of the real estate owned by the testator at the date of the execution of the will. And while the English courts have continued to treat all devises as specific, notwithstanding the later statute whereby wills may pass all real property owned by the testator at the time of his death (18 Am. & Eng. Ency. of Law, 2d ed., p. 720), it has generally been held in the United States that statutes making wills speak as of the time of the testator's death have the effect of permitting devises to be general, at least as to after-acquired property. (Ibid.; *Kelly v. Richardson*, 100 Ala. 584, [13 South. 785].) Such statutes are in force in this state, (Civ. Code, secs. 1312, 1332), and the legislature has in other ways evidenced its intent that real and personal property taken under a will should stand on the same footing. By sections 1358, 1359, and 1360 of the Civil Code, the property of decedents is made liable for the payment of debts and legacies, regardless of its character as real or personal. Sections 1359 and 1360 both speak of property "specifically devised or bequeathed," and in using the term "specific" indifferently, as applied to realty and to personalty, must be taken to use it in the same sense as to both.

A specific legacy (or devise), then, is one of "a particular thing [or parcel of land], specified and distinguished from all others of the same kind belonging to the testator." That the codicil undertakes to devise particular parcels of land, "distinguished from all others of the same kind belonging to the testator," would seem to admit of no doubt, since the various parcels devised are definitely and particularly described. If the devises covered merely the land so described, the appellants would hardly undertake to contend that such

devises were not specific. They rely, however, on the words immediately following the description,—i. e. “together with all real estate I may hereafter accumulate, as well as moneys at interest, etc., not otherwise appropriated.” The argument is that this, read in connection with the last clause of the codicil, is in effect a gift of the residue to the wife and sons of the testator, and that therefore the particular enumeration of certain pieces of property which form a part of the residue does not make the gift of those parcels specific. That the effect of the codicil is to bequeath and devise the residue of the testator’s estate to his wife and sons is, if not entirely clear upon the face of the instrument, conclusively settled as to all parties to this controversy by the former decree construing the will and codicil. In that decree we find it adjudged, *inter alia*, that “all the property of said deceased subject to his testamentary disposition at the time of his death, not in the said will and codicil otherwise specifically provided for, is, by the terms of said will and codicil, divided between his wife and sons.” And no doubt it is the general rule that the enumeration of specific articles in a residuary clause will not necessarily make the bequest specific as to such articles. (18 Am. & Eng. Ency. of Law, 2d ed., p. 716.) This rule has been repeatedly applied to wills which purported to give certain specified property, “and all the rest and residue of my estate, etc.” (*Le Rougetel v. Mann*, 63 N. H. 472, [3 Atl. 746]; *England v. Vestry*, 53 Md. 466; *Walker’s Estate*, 3 Rawle, 229.) The same rule applies where the gift is of “the rest and residue of my estate, including all my household furniture, ornaments, books, pictures, and utensils.” (*In re Martin*, 25 R. I. 1, [54 Atl. 589]. See, also, *Stehn v. Heysen*, 124 Wis. 583, [102 N. W. 1074].)

On the other hand, a different conclusion has been reached where language was used indicating an intent to separate a specific gift from a residuary gift to the same legatee or devisee. In *Clark v. Butler*, 1 Meriv. 304, the testator bequeathed all his household lease in London and all his household goods and furniture at Sawbridge, “and as to all my plate, linen, china, pictures, live and dead stock and all the residue of my goods, chattels and personal estate,” to a legatee. It was held that the gift was specific as to the lease in London and the household goods and furniture at Saw-

bridge. In *Fitzwilliams v. Kelly*, 10 Hare, 866, the testatrix devised certain leaseholds and her shares in the Chelsea water-works, "and also her stocks, funds and securities for money, and all other her personal estate and effects whatsoever." The leaseholds and shares were held to be specifically bequeathed. In *Langdale v. Esmond*, 4 Ir. Eq. 576, the will gave the "remainder of my books and paintings, together with the residue of my property," and the gift of the books and paintings was treated as specific. (See 18 Am. & Eng. Ency. of Law, 2d ed., p. 716, and *Hill v. Hill*, 11 Jur. (N. S.) 806.) In *Dauel v. Arnold*, 201 Ill. 570, [66 N. E. 846], the will contained the following clause: "Also all my bank stocks and effects in the State Bank of Colfax, valued at \$6,300, and also including the several sums due me, or which may be due from my children as heretofore specified, or which may be due me from any sources whatever, and any other property or effects, real or personal, of whatsoever kind, which I now have or may have, I devise and bequeath to my wife. . . ." The court held that the legacy of the bank stock was specific, saying, "the gift is specific if the specific things are so enumerated as to distinguish them from the residue, as by the use of such words as 'together with,' 'as well as,' 'and also,' and the like."

In short, the question is purely one of construction. The testator's intent is to be determined in each case from a consideration of the particular language employed. A bequest or devise of the residue of an estate is general, because such residue is not ascertainable at the time the will is made. The fact that, in giving such residue, the testator describes, as included in it or forming a part of it, certain specific property owned by him, does not alter the character of the residuary gift. But where the language used indicates an intention to make two distinct gifts,—one of specific property and the other of the residue,—the specific legacy or devise is not rendered general by the fact that there is a gift of the residue to the same person. We think the language of this codicil brings it within the principle of the cases last cited. The testator indicated, as plainly as language could do it, his intention to give to his wife and his sons the particular parcels of real estate described in the codicil. That he added to this gift the words "together with all real estate I may hereafter

accumulate," etc., did not make the preceding enumeration a mere part of the residuary gift. On the face of the will and the codicil alone, the court below rightly construed the devises of the real estate described in the codicil as specific. In this connection we may notice the finding of fact that at the time of the execution of the codicil the decedent owned sufficient personal property to pay all the general legacies mentioned in the will and codicil. This finding is attacked as unsupported by the evidence. The fact declared in it is merely probative. Whether or not the testator, when he made his will, had sufficient personal property to satisfy the general pecuniary legacies, without resort to the land described in the will, is a circumstance bearing on his intent. If he had no such property, there would be less reason for holding the devises specific, since it will not be presumed that he intended to make general legacies which could not be paid except out of the realty, and then devised the realty so that it could not be applied to the payment of those legacies. The ultimate fact in issue, however, is whether or not the devises are specific, and it may well be that the finding as to this fact could stand, even though it should be held that there is no evidence to support the probative finding as to the personal property owned by the testator at the date of the codicil. We are of opinion, however, that the evidence justified the conclusion reached by the court regarding the testator's property. He owned, at the date of the codicil, a one-half interest in the firm of Painter & Co. We shall not undertake to review the complicated mass of testimony that was given regarding the business and condition of this partnership. The relations between the estate of the decedent and the surviving partner have been the subject of litigation which has lasted many years. It is enough for the purposes of this case to say that, if we concede the correctness of the contention of appellants that Jerome B. Painter was largely indebted to the firm on what is called in the record the "school land account," there was still sufficient evidence to justify the view that his share of the partnership assets was enough to pay this indebtedness and leave a surplus which would be adequate to discharge the legacies given by paragraph 5 of the will.

The court found that all the real property of which the decedent was seized or possessed, or in which he had any

interest, except that owned by the firm of Painter & Co., is particularly described in the will. It is urged that the evidence shows that the decedent owned lots 1399 and 1401 in "Gift Map No. 2," Harvey's Addition to the city and county of San Francisco. But there was also evidence justifying the conclusion that this property, although standing in the name of J. B. Painter, was in fact owned by the firm of Painter & Co.

It is claimed that the court erred in denying to Adaline Mininger and to Josephus Painter any right to participate in the rents derived from the building Nos. 318, 320, and 322 Clay Street. It is argued that the gift of a share of these rents, in paragraph 3 of the will, was specific, and that it had been conclusively determined by the former decree construing this will that the codicil did not revoke the *specific* legacies given by the will. But whether or not this gift of a portion of the rents was specific, and whether or not it was revoked, it was, by the terms of paragraph 3, merely a gift of such rents until the testator's sons Albert and Walter should reach the age of twenty-one years. Both were over this age when the testator died, and hence this gift to Josephus Painter and to Adaline Mininger never took effect.

The appellants assign as error the ruling of the court admitting in evidence a paper dated 1863, shown to be in the handwriting of the decedent, and purporting to contain a statement of the assets and liabilities of Painter & Co. Doubtless such paper was not competent evidence of the condition of the firm's affairs, but it appears to have been offered merely for the purpose of showing the belief of J. B. Painter as to the *status* of the business. If his belief regarding his property was material,—which does not seem to be disputed by appellants,—we think his declaration, written or oral, was properly admitted as some evidence of such belief. (16 Cyc. 1183. See *Kyle v. Craig*, 125 Cal. 107, [57 Pac. 791].) The ruling admitting in evidence a "Schedule of Personal Property," dated 1864, is attacked, but, as no exception was taken, the action of the court cannot be reviewed. Some other points are made on the admission of testimony, but none of them, even if well taken, is of sufficient importance to justify a reversal.

The orders appealed from are affirmed.

Shaw, J., Angellotti, J., Henshaw, J., McFarland, J., and Lorigan, J., concurred.

[L. A. No. 1501. In Bank.—February 7, 1907.]

A. V. D. GOORBERG, Respondent, v. THE WESTERN ASSURANCE COMPANY, Appellant.

FIRE INSURANCE—SEPARATE ITEMS INSURED—ENTIRETY OR SEVERABILITY OF CONTRACT—NATURE OF RISK.—Where several items are insured in a policy of insurance against loss by fire, the question of the entirety or severability of the contract depends upon the nature of the risk. Where the property is so situated that the risk on one item cannot be affected without affecting the risk on another item, the policy must be regarded as entire; but where the property is so situated that the risk on each item is separate and distinct from the risk on the others, the policy must be regarded as severable.

1D.—QUESTION OF INTENTION.—Whether a contract of fire insurance is entire or severable is a question of intention, to be determined from the language employed by the parties, viewed in the light of the circumstances surrounding them at the time they contracted.

1D.—CONDITIONS AVOIDING POLICY—CONSTRUCTION AGAINST INSURER.—Where the policy insuring several classes of property provides that it shall be void in certain events in view of the settled rule that any uncertainty or ambiguity in a contract of insurance is to be interpreted most strongly against the insurer, this language should not be given the effect of avoiding the contract as to every item insured in all cases.

1D.—BREACH OF CONDITION AS TO ONE ITEM—ENTIRETY OF PREMIUM NOT CONCLUSIVE—PROTECTION OF INSURER.—Where the nature of the risk makes the contract severable, the mere fact that the premium is entire should not affect the conclusion of severability, because of a breach of conditions as to one item. On the other hand, where the breach of conditions, although in terms affecting only one item, is such as to increase the hazard to which other items are subjected, the avoiding of the policy as to all such items is the very thing which is requisite to protect the insurer from having to assume a greater risk than he contracted for.

1D.—MISREPRESENTATION AS TO TITLE—"SQUATTER'S" POSSESSION—SEPARATE INSURANCE OF HOUSE AND FURNITURE—ENTIRE CONTRACT.—Where there were separate items of furniture in a house also insured, and there was a misrepresentation as to title to the land, by reason of the house being on a mere "squatter's" possession of

government land, the risk of insurance on the furniture is affected by the risk on the house coupled with it, which latter risk is greater than it would have been if he owned the land, and the contract of insurance of the house and furniture must, so far as concerns the representation as to title, be treated as entire.

ID.—DISCOVERY OF FACTS AFTER FIRE—RETENTION OF PREMIUMS—DEFENSE NOT WAIVED.—The fact that the insurance company discovered the true state of the title shortly after the fire, and afterwards retained the premium, cannot affect its right to defend on the misrepresentation as to title. The company was not bound to rescind the contract in order to defend under its terms against its liability thereupon for such misrepresentation; nor could the retention of the premium after the loss constitute any waiver or estoppel on the part of the insurance company against such defense.

ID.—WAIVER OR ESTOPPEL AFTER LOSS—ESSENTIAL FACTS—RELIANCE—CHANGE OF POSITION—INJURY.—To constitute a waiver or estoppel by the action or non-action of the insurer after the loss, it is essential that the insured party should have relied upon the conduct of the insurer, and been induced by it to put himself in such a position that he would be injured if the insurer were allowed to repudiate its action.

ID.—PLEADING—WAIVER—FACTS CONSTITUTING ESTOPPEL.—Where the complaint showed affirmatively the breach of warranty as to title, and, to overcome this, alleged the issuance of the policy by the defendant after notice of the defect of title, but did put in issue the retention of premium after knowledge of the defect, he cannot rely thereupon. If the plaintiff relies upon any facts constituting a waiver or estoppel as to any defense which would otherwise be available under the facts stated in the complaint, the facts constituting such waiver or estoppel must be pleaded in the first instance.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

Sylvester G. Williams, and Edwin A. Meserve, for Appellant.

George L. Keefer, for Respondent.

SLOSS, J.—This is an action upon a policy of fire insurance, by which, in consideration of a premium of \$21.75, the defendant insured the plaintiff in the sum of \$1,700 against

loss or damage by fire to five different items of property, a specific amount of insurance being apportioned to each item: that is to say, \$550 on a frame dwelling, situate upon certain land described in the policy; \$725 on household furniture contained in said dwelling; \$150 on a smaller dwelling, situate upon the same land; \$75 on household furniture situate in the smaller dwellings; and \$200 on tools, farming implements, etc., contained in the building first described. A fire occurred, causing damage to each of the five items. The amount of such damage is not here in dispute.

The principal defense, and the only one which need be considered on this appeal, is based upon the following provisions of the policy: "This entire policy shall be void if the insured has concealed, or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

It appears that the buildings were located upon unsurveyed government land, to which plaintiff had no title. He was merely in possession as a "squatter."

The plaintiff claimed, and so alleged, that any warranty as to title had been waived by defendant's agents, in that they had caused the policy to be issued after having received from plaintiff full notice of the fact that he was holding as a "squatter" on unsurveyed government land. This alleged notice and waiver were denied by the insurer, which alleged that plaintiff, at the time of applying for the insurance, stated to defendant that he was the owner in fee simple of the land, and on these issues the case went to trial before a jury.

The court charged the jury as follows:—

"I instruct you that on the evidence before you, without any conflict, the plaintiff is entitled to a verdict for \$748.95 for loss on the personal property described in the policy of insurance.

"As to the loss claimed on the buildings, I instruct you that if you find that the defendant or its agents did not know, or had not been informed at the time of the issuance of the policy, that the plaintiff did not own the land on which the

buildings were located, and did not learn that plaintiff did not own the land until after the commencement of this action, then plaintiff is not entitled to recover anything for the loss of the buildings. But if defendant or its agents did have knowledge of the plaintiff's title or learned of it before the fire, then there was a waiver of the fact that plaintiff did not own the land and plaintiff is entitled to recover the loss of said building, viz.: \$575.30. If you find on this issue in favor of the plaintiff, your verdict will be for the plaintiff for \$1,324.25. If you find on this issue in favor of the defendant, then your verdict will be for the plaintiff in the sum of \$748.95."

The verdict was for \$748.95 (the amount of loss claimed on the second, fourth, and fifth items of the policy), and defendant appeals from the resulting judgment and an order denying a new trial.

It is evident that the trial court regarded the conditions and warranties which we have quoted as applying solely to the buildings insured, and not to the contents of those buildings. In other words, the policy was treated as severable into as many contracts as there were items insured. Whether such policies, insuring distinct items for different amounts, in consideration of a gross premium, are to be regarded as entire or severable, is a question that has not heretofore come before this court, although it has been passed on by the courts of many other states. The authorities on the point are so numerous that it would be impracticable to attempt to review, or even to cite, all of them. There is conflict between the adjudications of different courts, and even, in some instances, between those of the same court. In a general way, the effect of the cases may be summarized and illustrated by saying that the courts of a number of states have laid down the rule accepted by the trial court in the case at bar,—namely, that where the property insured consists of different items which are separately valued or insured for separate amounts, the contract is divisible, and a breach of warranty or condition as to one item will not affect the insurance on the remainder of the property, even though the premium be entire. (*Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, [29 Am. Rep. 184]; *Schuster v. Dutchess County Mut. Ins. Co.*, 102 N. Y. 260, [6 N. E. 406]; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.)

9, [81 Am. Dec. 521]; *Continental Ins. Co. v. Ward*, 50 Kan. 346, [31 Pac. 1079]; *State Ins. Co. v. Schreck*, 27 Neb. 527, [20 Am. St. Rep. 696, 43 N. W. 340]; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, [4 Am. Rep. 582]; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Sullivan v. Hartford Fire Ins. Co.*, 89 Tex. 665, [36 S. W. 73]; *Manchester Fire Assurance Co. v. Feibelman*, 118 Ala. 308, [23 South. 759]; *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, [41 Pac. 513]; *Clark v. New England Mut. Fire Ins. Co.*, 6 Cush. 342, [53 Am. Dec. 44]; *Bullman v. North British etc. Ins. Co.*, 159 Mass. 118, [34 N. E. 169]; *Wright v. Fire Ins. Co.*, 12 Mont. 474, [31 Pac. 87]; *Coleman v. New Orleans Ins. Co.*, 49 Ohio St. 310, [34 Am. St. Rep. 565, 31 N. E. 279]; *Light v. Greenwich Ins. Co.*, 105 Tenn. 480, [58 S. W. 851]; *Connecticut Fire Ins. Co. v. Tilley*, 88 Va. 1024, [29 Am. St. Rep. 770, 14 S. E. 851]; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, [27 Am. Rep. 582].)

On the other hand, there are many cases holding that such contracts are entire, and that a breach of any condition or warranty vitiates the whole insurance, most of these decisions basing their conclusion on the ground that the premium was a single or gross sum. (*Gottzman v. Pennsylvania Ins. Co.*, 56 Pa. 210, [94 Am. Dec. 55]; *Day v. Charter Oak F. and M. Ins. Co.*, 51 Me. 91; *Plath v. Minnesota Farmers' Mut. Fire Ins. Assn.*, 23 Minn. 479, [23 Am. Rep. 697]; *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202, [28 N. W. 555]; *Cuthbertson v. North Carolina Home Ins. Co.*, 96 N. C. 480, [2 S. E. 258]; *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, [78 Am. St. Rep. 216, 36 S. E. 821]; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, [51 Am. St. Rep. 457, 33 Atl. 429]; *McGowan v. People's Mut. Fire Ins.*, 54 Vt. 211, [41 Am. Rep. 843].)

There is still another line of cases which take a middle ground between the extreme doctrines above stated and hold that the question of the severability of the contract in such cases depends upon the nature of the risk,—i. e. that where the property is so situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy must be regarded as entire; but where the property is so situated that the risk on each item is separate and distinct from the risk on the other items, so that what affects the risk

on one item does not affect the risk on the others, the policy must be regarded as severable. (*Havens v. Home Ins. Co.*, 111 Ind. 90, [60 Am. Rep. 689, 12 N. E. 137]; *Phœnix Ins. Co. v. Pickel*, 119 Ind. 155, [12 Am. St. Rep. 393, 21 N. E. 546]; *Pickel v. Phœnix Ins. Co.*, 119 Ind. 291, [21 N. E. 898]; *Worachek v. New Denmark etc. Fire Ins. Co.*, 102 Wis. 88, [78 N. W. 411]; *Taylor v. Anchor Mut. Fire Ins. Co.*, 116 Iowa, 625, [93 Am. St. Rep. 261, 88 N. W. 807]; *Western Assurance Co. v. Stoddard*, 88 Ala. 606, [7 South. 397]; *Republic Co. etc. Ins. Co. v. Johnson*, 69 Kan. 146, [105 Am. St. Rep. 157, 76 Pac. 419]; *Hartshorne v. Agricultural Ins. Co.*, 50 N. J. L. 427, [14 Atl. 615]; *Boehm Lumber Co. v. Svea Ins. Co.*, 36 Wash. 520, [79 Pac. 34]; *Herzog v. Palatine Ins. Co.*, 36 Wash. 611, [79 Pac. 287]; *Ætna Ins. Co. v. Resh*, 44 Mich. 55, [38 Am. Rep. 228, 6 N. W. 114]; *Phœnix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, [37 S. W. 959]; *Baldwin v. Hartford Fire Ins. Co.*, 60 N. H. 422, [49 Am. Rep. 324].)

In our opinion, the rule declared in the cases last cited is supported by reason and tends to produce a just result. Whether a contract is entire or severable is a question of intention, to be determined from the language employed by the parties, viewed in the light of the circumstances surrounding them at the time they contracted. (*Sterling v. Gregory*, 149 Cal. 117, [85 Pac. 305].) In these cases the policy, insuring several classes of property, provides that it shall be void in certain events. In view of the settled rule that any uncertainty or ambiguity in a contract of insurance is to be interpreted most strongly against the insurer, it is proper to say that this language should not be given the effect of avoiding the policy as to every item insured in all cases. Where the warranty or condition which is broken does not affect the risk on certain items, the insurance should not be held to be ineffective as to those items. Such construction would subject the insured to a forfeiture for a cause which had no substantial relation to the interest of the insurer. The purpose of the warranties and conditions is to protect the insurer from liability on risks which he would have been unwilling to take for the stipulated premium, or perhaps for any premium. And if, as to any item, the breach of condition or warranty does not at all affect the risk, the release of the insurer from liability for that item may fairly be said not to have been

within the reason of the condition or warranty, and hence not within the contemplation of the parties. For example, where a single policy insured, in separate amounts, two buildings situated upon farms several miles apart, the breach of a warranty of title as to one would not in the slightest degree increase the risk on the other, and the policy should be held severable. (*Loomis v. Rockford Ins. Co.*, 77 Wis. 87, [20 Am. St. Rep. 96, 45 N. W. 813].) We do not think the mere fact that the premium is entire should affect this conclusion. On the other hand, where the breach of condition, although in terms affecting only one item, is such as to increase the hazard to which other items are subjected, the avoiding of the policy as to all such items is the very thing which is requisite in order to protect the insurer from having to assume a greater risk than the one he had contracted for. Take the case here presented, of a building, and furniture in the same, both covered by the same policy. There is a breach of a warranty or a misrepresentation relating to the title to the land on which the building was situated. That any misrepresentation as to title is material, and has the effect of avoiding the policy, at least as to the building, is undisputed. And one ground upon which the materiality of statements as to title has been put is that they "might, and probably would, influence the mind of the underwriter in forming or declining the contract. Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk or in estimating the premium." (*Columbia Ins. Co. v. Lawrence*, 2 Pet. 25, s. c. 10 Pet. 507.) "In other words, it is in their relation to the moral hazard that the materiality of statements as to title or interests rests." (2 Cooley's Briefs on Insurance, 1340.) The risk is greater, then, where a man insures a house which is on land not belonging to him than it would be if he owned the land. But if the risk on the house is greater by reason of the want of ownership, it is clearly greater as to the contents of the house. It is of course possible that a house may burn, and a part or all of its contents be saved, but surely the contents of a house are in great danger of burning if the house takes fire, and any circumstance which

increases the risk of fire to the house necessarily increases the risk to the contents. If the insuring company would have been unwilling to insure a house on land not belonging to the insured, because it might be more advantageous to the insured to have the house burn than to have it saved, it can hardly be supposed that it would have consented to take the risk on furniture contained in a house exposed to such hazard. It is, we think, no answer to this position to say, as was said in *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, [29 Am. Rep. 184], a case frequently cited, that insurance companies habitually insure the contents of buildings without insuring the building or inquiring about its ownership. Such insurance on the contents alone would involve no unusual hazard. It would not tempt the insured to permit his furniture or other movables to burn. But if it be coupled with insurance on a building which he does not own, and by the destruction of which he would profit, both the house and its contents are subjected to a risk which the insurer was not willing to assume, and one against the assumption of which he expressly contracted. In the case at bar, the court directed the jury to find a verdict for the plaintiff for the loss on the contents of the buildings notwithstanding the defense, and the evidence in support of it, that there had been a misrepresentation, which, as the defendant claimed, had not been waived. Under the views above set forth, this was error. The risk to the contents of the building was directly affected by any circumstance which affected the risk to the buildings themselves, and the contract should, so far as concerns the representation as to title, have been treated as entire.

In the foregoing discussion we have laid no stress on the fact that the language of the policy is that "this *entire* policy shall be void, if," etc. In most of the cases cited above the word "entire" did not appear in the policy in this connection. It has been held (sometimes even in jurisdictions where separate valuations are ordinarily regarded as rendering the contracts divisible) that the inclusion of this word makes the contract entire and indivisible. (*Germania Fire Ins. Co. v. Schild*, 69 Ohio St. 136, [100 Am. St. Rep. 663, 68 N. E. 706]; *Germier v. Springfield F. and M. I. Co.*, 109 La. 341, [33 South. 361]; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, [51 Am. St. Rep. 457, 33 Atl. 429]; *Martin v. Insurance Co.*

of *N. A.*, 57 N. J. L. 623, [31 Atl. 213]; *McWilliams v. Cascade F. and M. I. Co.*, 7 Wash. 48, [34 Pac. 140].) But there are also cases holding, in effect, that no valid distinction can be drawn between the words "this policy shall be void" and "this entire policy shall be void." (*Kiernan v. Dutchess County Mut. Ins. Co.*, 150 N. Y. 190, [44 N. E. 698]; *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, [41 Pac. 513]; *Kansas Farmers' Fire Ins. Co. v. Saindon*, 53 Kan. 623, [36 Pac. 983]; *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75, [42 Am. St. Rep. 523, 25 S. W. 848].) In view of our conclusion that the policy in question is for other reasons an entire contract, it is not necessary in this case to express any opinion as to the effect of the use of the word "entire" in a policy which in the absence of such word would be treated as divisible.

The respondent contends that whatever construction be put upon the policy the judgment must be affirmed, because there was uncontradicted testimony to the effect that shortly after the fire the company ascertained the true state of the title, and for a period of several months thereafter and up to the time of trial, made no offer to return the premium. During all this time, however, it denied liability. It may be conceded that if, by reason of a breach of warranty as to title, no risk ever attached, the insured was entitled to a return of his premium. (Civ. Code, sec. 2617.) But the insurer's delay in offering to repay it (assuming the delay to have been unreasonable), did not forfeit the right to defend for such breach. The cases cited to the proposition that a party cannot rescind a contract without restoring what he has received under it are not in point. The defendant is not in this action seeking to rescind the contract sued upon; it is standing upon the contract, and insisting that under its terms there is no liability. Nor can the mere retention of the premium, *after the loss has occurred*, and where the liability is steadfastly denied, constitute either a waiver of the defense or an estoppel. To constitute such waiver or estoppel by the action or non-action of the insurer after the loss, it is essential "that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action." (*McCormick v. Orient*

Ins. Co., 86 Cal. 260, [24 Pac. 1003]; *McCormick v. Springfield F. and M. I. Co.*, 66 Cal. 361, [5 Pac. 617].) Here nothing was done which could have led the insured to believe that the defendant would not take advantage of the breach of warranty. On the contrary, it persistently asserted its reliance upon such breach. If the case of *Fishbeck v. Insurance Co.*, 54 Cal. 422, is in conflict with these views, it must be regarded as overruled by the *McCormick* cases just cited. (See, also, *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358; *Austin v. M. R. F. L. Assn.*, 132 Fed. 555; *Thompson v. Traveler's Ins. Co.*, 11 N. Dak. 274, [91 N. W. 75]; *Blaeser v. Insurance Co.*, 37 Wis. 39, [19 Am. Rep. 747].)

Furthermore, the retention of the premium was not pleaded by the plaintiff. His complaint showed affirmatively that there had been a breach of warranty as to title, and to overcome this he was obliged to allege facts showing a waiver or estoppel. He met this requirement by alleging the issuance of the policy by the defendant after notice of the defect of title, but this did not put in issue any waiver or estoppel that might have been created by other facts. If the plaintiff relies on waiver or estoppel as to any defense which would otherwise be available to the defendant under the facts stated in the complaint, the facts constituting such waiver or estoppel must be pleaded in the first instance. (19 Cyc. 923; *Gillon v. Northern Assurance Co.*, 127 Cal. 480, [59 Pac. 901]; *Vernon Ins. and T. Co. v. Maitlen*, 158 Ind. 393, [63 N. E. 755]; *Bruce v. German S. and L. Soc.*, 24 Or. 486, [34 Pac. 16]; *McCoy v. Iowa State Ins. Co.*, 107 Iowa, 80, [77 N. W. 529].)

The judgment and order appealed from are reversed.

Henshaw, J., McFarland, J., and Lorigan, J., concurred.

[S. F. No. 3754. In Bank.—February 8, 1907.]

S. J. DUCKWORTH and FLORA MCKINLAY DUCKWORTH, Respondents, v. WATSONVILLE WATER AND LIGHT COMPANY et al., Appellants.

RIPARIAN RIGHTS—BEGINNING AND EXTENT.—A riparian right is limited to the riparian land, and begins only when the water reaches the riparian land. The riparian owner has the right to use the water as it passes his land for domestic purposes thereon, and to take out a reasonable portion thereof for the irrigation of his abutting land; and for the protection of this right, beginning when the water reaches his land, he has the right to insist that the water above his land shall not be polluted to his injury, nor diminished by other riparian owners above so as to deprive him of his just portion, and perhaps, as to other than riparian owners, the right to prevent any substantial diminution of the amount of the water which would naturally flow to his land.

ID.—LAND ON OUTLET OF LAKE—RIGHT LIMITED TO WET SEASON—CONVEYANCE.—A riparian owner has no title in the water of a stream before it reaches his land; and an owner of land not abutting on a lake, but only on an outlet thereof, through which water naturally flows from the lake to his land only in the wet season, has no riparian right in the lake or in pools standing above his land from which there is no natural flow to his land in the dry season; and he can convey no riparian right other than that which he owns upon the outlet to the lake, when water naturally flows therein. No one can sell or convey to another that which he does not own.

ID.—CONVEYANCE OF RIPARIAN RIGHTS — RESERVATION — SUBSEQUENT CONVEYANCE OF LAND TO PLAINTIFFS.—Where long prior to the conveyance to plaintiffs of lands riparian to a lake and its tributaries, their grantor had made conveyances to the grantors of defendant water company of all waters and water-rights pertaining to the land, reserving only sufficient water for domestic use and watering stock thereupon, the subsequent conveyance of the land to plaintiffs conveyed only such reserved water-right as an appurtenance thereto.

ID.—USE OF RESERVED RIGHT NOT ADVERSE.—The use of the reserved right of water sufficient for domestic use and for the watering of stock by plaintiffs and their grantor was not adverse to the rights of the defendant water company to the water-rights in the lake acquired under such grantor.

ID.—APPROPRIATION OF WATER—STREAM FLOWING INTO LAKE.—Where a stream flows into a lake a valid appropriation of water may be made either from the stream or from the lake in which the stream terminates, and which constitutes a part of it; and where a water company holds all the waters of the lake, except that which was

reserved, and with which it does not interfere, it may appropriate the water and take it to non-riparian lands to be used thereon for irrigation.

ID.—ESTOPPEL OF GRANTEES.—The plaintiffs as grantees from the common grantor, who had conveyed to defendants' grantors all waters of the lake other than the right reserved, are estopped by the deeds under which the water company claims from contending that the rights conveyed were only riparian, and that the appropriation by the water company is inconsistent therewith, no rights granted having been regained by adverse possession.

ID.—APPROPRIATION BY PLAINTIFF—CONTEST OF DEFENDANTS—APPROPRIATION.—A plaintiff is not estopped by such deed from making a subsequent appropriation of the water, and contesting the validity or effect of the appropriation made by the water company.

ID.—PLEADING—CROSS-COMPLAINT—INSUFFICIENT DENIAL—ADMISSION.—Where the water company, as defendant, did by way of cross-complaint allege that it "is the owner and entitled to the exclusive use of all the waters of the lake," an answer thereto, denying that the water company is or has been "the owner and entitled to the exclusive use of all the waters of the lake," is insufficient and constitutes an admission that the water company is entitled to substantially all of the water.

ID.—RIGHT OF APPROPRIATION NOT CONFINED TO PUBLIC LANDS.—The right to appropriate water under the provisions of the code is not confined to streams running over public lands of the United States; but it exists wherever the appropriator can find the water of a stream not appropriated and in which no other person has or claims superior rights and interests.

ID.—EFFECT OF APPROPRIATION.—The effect of an appropriation under the statute, when completed, is that the appropriator thereby acquires a right superior to that of any subsequent appropriator in the same stream; but he acquires thereby no right whatever as against rights existing in the water when the appropriation was begun, unless it has been continued adversely for a sufficient time to obtain a prescriptive title, and then only to the extent of the use. The amount claimed in the notice is no measure of the right.

ID.—RIGHTS OF PRIOR APPROPRIATOR AND RIPARIAN OWNER—DECREE QUIETING TITLE.—A prior appropriator who is also a riparian owner is entitled to a decree quieting his title against a subsequent appropriator whose rights are subordinate thereto.

ID.—EFFECT OF USE UPON RIPARIAN RIGHT.—A riparian right is neither gained by use nor lost by disuse; and the fact that the prior appropriator had not used the riparian right appurtenant to its land cannot affect the right of the owner thereof to have his title quieted thereto as against a subsequent appropriator, though such riparian right does not exist except for beneficial use upon the land to which it attaches.

ID.—RIGHTS OF SUBSEQUENT APPROPRIATOR TO SURPLUS—PROTECTION OF PRIOR APPROPRIATOR.—An appropriator is entitled only to the water actually taken and used, and a prior appropriator is not entitled to prevent a subsequent appropriation and use of any surplus water, if any exists. But the prior appropriator may insist upon a reasonably ample quantity to last through the entire season until rains renew the supply, and may enjoin any depletion of the supply which will so lower the water surface as to substantially increase the cost of making the diversion which the prior appropriator is entitled to make.

ID.—SUFFICIENCY OF NOTICE.—A notice of appropriation stating that the water claimed is to be used for irrigation upon certain described land belonging to the appropriator's wife is not vitiated by an additional statement that it may be used for irrigation by other parties whose lands are not described. A statement that the water is to be conveyed to the place of use "by a six-inch pipe or by a pipe of other dimensions" is sufficient to authorize a diversion of the quantity that could be carried in a six-inch pipe, not exceeding the quantity claimed as the maximum.

ID. — ACKNOWLEDGMENT OF DEED — SUFFICIENCY OF CERTIFICATE AND SIGNATURE.—A certificate of acknowledgment of a deed made before a notary public, which recites his name and official character as a notary public in and for the county named, in the usual form, and is signed by him merely with the words "Notary Public" after his signature, sufficiently states the name of his office, within the requirement of section 1193 of the Civil Code, to entitle the deed to record.

APPEAL from a judgment of the Superior Court of Santa Cruz County. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

C. A. Shurtliff, and H. C. Wyckoff, for Appellants.

The owner of land has a right to the surface and everything permanently situated beneath or above it. (Civ. Code, sec. 829.) The term "land" comprehends "water," among other things, and has an indefinite extent upwards and downwards. (2 Black. Com. 18.) Standing water is not the subject of appropriation. (*Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 617, 30 Pac. 783; *Hanson v. McCue*, 42 Cal. 309, 10 Am. Rep. 299; *Painter v. Pasadena L. and W. Co.*, 91 Cal. 74, 27 Pac. 539; *Gould v. Eaton*, 111 Cal. 644, 52 Am. St. Rep. 201, 44 Pac. 319; *Gouverneur v. National Ice Co.*, 57 Hun, 474, 11 N. Y. Supp. 87; *Farnham on Waters*, p. 1560; *Gould on Waters*,

sec. 75.) The right to take water is a servitude which may be assigned by the owner of the land. (Civ. Code, secs. 803-806, 1014; *Painter v. Pasadena L. and W. Co.*, 91 Cal. 74, 27 Pac. 539; *Fudickar v. East Riverside etc. Co.*, 109 Cal. 29, 41 Pac. 1024.)

H. A. Van C. Torchiana, and W. P. Netherton, for Respondents.

A stream of water flowing out into a broad sheet is a watercourse. (*Rigney v. Tacoma Light etc. Co.*, 9 Wash. 576, 38 Pac. 147; *Works on Irrigation*, p. 27; *Pomeroy on Water-Rights*, secs. 65, 67.)

SHAW, J.—Plaintiffs are the owners of three hundred and twenty acres of land fronting on Pinto Lake, the plaintiff Flora being the owner of the fee, and the other plaintiff the owner of a leasehold interest. They claim rights in the waters of the lake as riparian proprietors thereon, and the plaintiff S. J. Duckworth also claims a right by appropriation to take therefrom a quantity of water equal to a continuous flow of two hundred and fifty miners' inches under a four-inch pressure. The lake contains an area of about seventy acres. The defendant Watsonville Water and Light Company owns sixty-five acres of the bed and surface of the lake and all the lands surrounding it, except the land of plaintiffs and two other tracts of small extent, and claims the ownership of, and the right to take and use all the waters of, the lake. The purpose of the action, as stated in the complaint, is to have the plaintiffs' alleged rights determined. The corporation defendant filed a cross-complaint alleging ownership of all the water of the lake, and asking that its right be also determined. Judgment was given declaring that the plaintiffs have the right to take from the lake and use upon their land as much water as they could beneficially use thereon, not exceeding a continuous flow of two hundred and fifty miners' inches, and enjoining the defendants from interfering with the plaintiffs' right to such use, and that the defendant corporation take nothing by its cross-complaint. The defendants appealed from the judgment within sixty days after its rendition and present the evidence in the record by a bill of exceptions.

The plaintiffs derive their title to the land from Carmen Amesti de McKinlay, who on May 13, 1901, leased the land to S. J. Duckworth, and on August 6, 1901, conveyed it to the plaintiff Flora McKinlay Duckworth, subject to the lease. In 1885, while Carmen Amesti de McKinlay was the owner in fee of the land, she made conveyances to the defendants Smith and Montague, whereby she granted to them "all and singular the water and riparian and water-rights and privileges of every kind, character and description which belong, or in any manner pertain to" the three hundred and twenty acres of land, the same being particularly described therein, reserving, however, the right to water for domestic use and watering stock thereon. On January 21, 1897, Smith and Montague conveyed to the Watsonville Water and Light Company all the waters, rights, and privileges conveyed to them by Carmen Amesti de McKinlay as aforesaid. Smith and Montague thereupon, so far as appears, ceased to have any interest in the property in controversy. They joined in the answer and join also in the appeal. There are some indications in the evidence that their holding prior to 1897 was for the benefit of the water company. In any event, as they have no present interest, their position in the case need not be further discussed. It is claimed that the evidence does not sustain the findings. As to several of them we think this contention is well founded.

1. There was an outlet to Pinto Lake, through which water usually flowed from the lake during the rainy season of each year, but which was dry at all other times. One Grimmer owned a tract of land which abutted upon this outlet at a point some distance below the lake. On March 21, 1903, Grimmer conveyed to S. J. Duckworth "all riparian rights and other water-rights and water" which he possessed in this outlet as appurtenant or belonging to this tract of land. This conveyance was made after the beginning of the action, but before the filing of the cross-complaint, and in his answer to the cross-complaint Duckworth averred that by virtue thereof he was a riparian owner to the waters of the lake. The court found, in accordance with this answer, that the plaintiff S. J. Duckworth "is a riparian owner of the waters of said Pinto Lake, its tributaries and outlet," by virtue of this deed. Even if we consider the lake with its tributaries and outlet

as forming one continuous stream of water, as the lower court found it to be, this finding is not technically true. Every owner of land upon a stream is in some respects interested in the entire stream. He has the right to use the water as it passes his land for domestic purposes thereon, and to take out a reasonable portion thereof for the irrigation of his abutting land; and for the protection of this right, which begins only when the water reaches his land, he has a certain right with regard to all the waters of the stream above his land, the right to insist that it shall not be polluted to his injury nor diminished from use by other riparian owners above, so as to deprive him of his just portion, and perhaps, as to other than riparian owners, the right to prevent any substantial diminution of the amount of water which would naturally flow to his land. If nothing more than this was meant by the finding in question, we could not say that it was not supported by some evidence, nor that it was not a correct general statement of the right of Duckworth under the Grimmer deed. But the finding is that Duckworth thereby became a "riparian owner" of the waters of the lake, and it appears that under it he claims some right, as against the defendant water company, to take water from the lake for use, not on the Grimmer land, but on the Duckworth land, which abuts on the lake far from the outlet, and that not only during the rainy season, or at such times as there is water flowing to the Grimmer land, but during all seasons and when the outlet is entirely dry. The court below seems to have intended this finding to declare some such right. This claim is contrary to the doctrine of riparian rights and to the general principles of law as well. Neither a riparian proprietor nor an appropriator has title or ownership in the water of the stream before it reaches his land, or point of diversion, respectively. This has been expressly decided with respect to appropriators. (*Parks M. Co. v. Hoyt*, 57 Cal. 46; *Riverside W. Co. v. Gage*, 89 Cal. 418, [26 Pac. 889]; *McGuire v. Brown*, 106 Cal. 670, [39 Pac. 1060].) The same rule applies to the riparian owner. As a riparian owner, Grimmer had no title to the water, except as it passed in front of his land and constituted the stream. The right or title to the stream as it passed was a part and parcel of his land, a part of the realty. (See cases last cited.) Being a part of his realty on his land, it was also part of the realty of other riparian

owners at the points where it passed over their lands. Hence, the title of each to the water exists only during such passage, and the right of each in the water during its course above consists only of the right to use such means as are necessary to preserve it until it reaches his land. Grimmer had the right to use a reasonable portion of the water running in the outlet by his land for the irrigation of his land riparian thereto, and to take the whole of it, if necessary, for domestic purposes. This right exists because the stream runs by the land, and thus gives the natural advantage resulting from the relative situation. When the stream ceased and the channel became dry, he for the time being ceased to be a riparian owner, so far as a present use of the water was concerned. His land did not at those times border upon any stream. It did not then possess any natural right to the use of the water standing in pools or lakes at points above his land. During such dry periods he could obtain the use of water from such pools or lakes only by convention with the owners of the lands abutting upon them. He would not have it by virtue of any right pertaining to his own land. Furthermore, his riparian right is limited to his riparian land. It gave no right to use any of the water of the stream for any purpose upon land not riparian, nor upon any riparian land other than his own. No one can sell or convey to another that which he does not himself own. Grimmer could not by a transfer of his riparian rights sell to the plaintiff, as against third persons having interests in the water, the right to use the water upon any land, riparian or non-riparian, except his own, to which it originally attached. His deed operated to prevent him from complaining of a diversion, but it did not affect other parties. It does not appear that Grimmer had any water-rights, except his right as riparian owner to the use of the water of the outlet. It follows, therefore, that Duckworth did not obtain anything by the Grimmer deed except the right to use the water of the outlet on the Grimmer land, when any water was flowing therein, and an estoppel against Grimmer to prevent complaint by him against any use of such water which Duckworth might make to the injury of the Grimmer riparian right as above defined. It did not in any respect add to his rights to take water from the lake for use on the Duckworth land, as against the de-

fendants, or as against any one except Grimmer and his successors in interest.

2. The findings further state that the water company has never exercised or used any of the water-rights derived from the deeds from Carmen Amesti de McKinlay to Smith and Montague. This is true in the literal sense that it has not used any water upon the land to which these rights prior to those deeds attached. But it appears from the evidence that the water company was pumping water from the lake during the eight years extending from December, 1894, to December, 1902. The amount is not shown, but it was enough, during part of the time at least, according to the testimony of William A. White, its superintendent, to furnish water to several strawberry-growers for irrigation of their plants, and so much that if the plaintiffs took the two hundred and fifty inches they claim the two diversions would not leave much water in the lake at the end of the dry season. This evidence is not as definite as it should have been, but there being no evidence to the contrary it established the fact that the company had taken a substantial quantity of water from the lake during the time specified. Such taking would have been contrary to the riparian rights attached to the Duckworth land, if they had remained unsevered therefrom. By reason of its purchase of these riparian rights the company possessed the right, so far as that land and its owners were concerned, to use the whole or any part of the waters of the lake except such as were necessary for domestic use and for the watering of stock thereon. The pumping of the water was done in the exercise of this right, and it was a right obtained by virtue of the McKinlay deeds. This finding is therefore contrary to the evidence.

3. There is a finding to the effect that, after the execution of the deeds by Carmen Amesti de McKinlay to Smith and Montague, in 1885, she continued in possession of the water and water-rights thereby granted to them, and that she and the plaintiffs, as her successors, did not relinquish possession thereof to the grantors, but have ever since then remained in possession thereof, and that they had been in the open, notorious, hostile, and adverse possession thereof for more than five years immediately before the commencement of this action. This finding has no support in the evidence. They did

indeed remain in possession of the land and continued to exercise all ordinary acts of ownership over it, including the use of the water of the lake for the watering of stock. This latter use of the water, however, was reserved in the deed, and hence it was not one of the rights granted. Even if it had been granted, the adverse use for the watering of stock alone could gain a right only to the extent of the use, and it would not confer any right to the additional use of water for the irrigation of land. There is no evidence that Mrs. McKinlay or either of the plaintiffs ever made any use of the water other than for the watering of stock, or claimed the right to do so as against the defendants, until November, 1902, a few months before this action was begun. The finding seems to have been based on the fact that the defendants never entered upon the land of the plaintiffs for the purpose of exercising or asserting the right to use the waters of the lake which they obtained under the McKinlay deeds. But it was not requisite to the exercise of the rights granted by the deeds that they should enter upon the land, unless it became necessary to do so in order to get the water from the lake. The deed was evidently procured to protect the grantees from interference in their proposed diversion of water from the lake. They could get the water from any other point on the lake as well as from the limits of the McKinlay land, and it appears that they took it from the lower end of the lake. This was a taking from the McKinlay land as well as from all the other land on the borders of the lake. The force of gravity would accomplish that. The use which was made of the land by the plaintiffs and McKinlay was not antagonistic to the right which the defendants had to the water under the grant. It is not true, therefore, that the grantor and her predecessors continued or remained in possession of the rights of the grantee, nor that said rights were not relinquished to the grantees, nor that the possession of the plaintiffs and their predecessor extended to the water-rights granted, or was hostile and adverse to the grantee, or open and notorious with respect thereto. According to the evidence, their actual use of the water, if any, did not begin under their adverse claim until the day of the trial in the lower court.

4. There is some evidence that Pinto Lake, with its tributaries and outlet, during the rainy season, constituted a run-

ning stream of water. It is clear that during the dry seasons there was no water flowing out of the lake, but there is evidence that during that period there was a slight flow from a tributary into the lake. We cannot agree with the appellant in his contention that the finding that the lake, or its tributaries, constituted a running stream is not sustained by the evidence. We think the better doctrine in respect to the character of a stream from which the statute provides for appropriations is that it is not necessary that the stream should continue to flow to the sea or to a junction with some other stream. It is sufficient if there is a flowing stream; and the fact that it ends either in a swamp, in a sandy wash in which the water disappears, or in a lake in which it is accumulated upon the surface of the ground, will not defeat the right to make the statutory appropriation therefrom, and we can see no reason why the appropriation in such a case may not be made from the lake in which the stream terminates, and which therefore constitutes a part of it, as well as from any other part of the watercourse.

5. The only use which the water company makes of the water is to take it to non-riparian lands, to be used thereon for irrigation. Respondents claim that the only right of the water company to the water shown in the case consists of the riparian rights pertaining to the narrow strip of land belonging to the water company surrounding the greater part of the lake, and the riparian rights under the McKinlay deeds, and that the use made of it is not in the exercise of either of these rights, but is inconsistent with each of them. In regard to this claim it is to be observed that so far as the use made of the water by the water company may affect the rights claimed by the Duckworths as riparian owners of the McKinlay land, they have no ground of complaint, being estopped by the McKinlay deeds and not having regained the rights by adverse possession. The estoppel does not extend to the water necessary for domestic use and for stock, but their right to that extent is not in dispute, nor have they been deprived of it by the water company. But S. J. Duckworth claims a right to a part of the water by appropriation, and with respect to the right thus claimed he has a *status* which entitles him to challenge the right of the water company. His privity with the McKinlay deed does not estop him from making an appro-

priation of any water in the lake that may be subject to appropriation, nor from demanding that the water company shall not make a greater use of the water than it is authorized to do by the rights which it is shown to have, if such use interferes with an appropriative right possessed by him. But the claim that the water company has not established any other right is not maintainable. Its cross-complaint alleges that it is, and for a long time has been, "the owner and entitled to the exclusive use of all the waters" of Pinto Lake. The plaintiffs in their answer thereto deny that the water company is, or has been, "the owner and entitled to the exclusive use of all the waters" of the lake. That is not a good traverse of the allegation. It is an admission that the water company is entitled to substantially all of the water. (*Fitch v. Bunch*, 30 Cal. 208; *Blood v. Light*, 31 Cal. 115; *Fish v. Reddington*, 31 Cal. 185; *Reed v. Calderwood*, 32 Cal. 109; *Doll v. Good*, 38 Cal. 287.) This allegation of the cross-complaint, therefore, stands as an admitted fact of the case, except so far as it is inconsistent with the affirmative allegations of the answer thereto and of the original complaint. The effect, for the purposes of the trial, was to establish the fact that the water company owns, and has the exclusive right to use for any purpose and at any place, all of the water of the lake, excepting such portion thereof, or right thereto, as is alleged and was proven to belong to the plaintiffs or either of them. Inasmuch as the evidence did not show, and the court did not find, that the alleged claims of plaintiffs included all the waters of the lake, the judgment that the defendants take nothing is contrary to the evidence and to this admission of the pleadings. The existing rights of other riparian owners not parties to this suit are not material to this case.

6. The right to appropriate water under the provisions of the Civil Code is not confined to streams running over public lands of the United States. It exists wherever the appropriator can find water of a stream which has not been appropriated and in which no other person has or claims superior rights and interests. And the right cannot be disputed except by one who has or claims a superior right or interest, and by him only so far as there is a conflict. It cannot be vicariously contested by another on behalf of the owner of the better right. The effect of an appropriation under the statute, when com-

pleted, is that the appropriator thereby acquires a right superior to that of any subsequent appropriator on the same stream. But he acquires thereby no right whatever as against rights existing in the water at the time his appropriation was begun. An appropriation does not of itself deprive any private person of his rights; it merely vests in the appropriator such rights as have not previously become vested in private ownership, either by virtue of some riparian right or because of prior statutory or common-law appropriation and use. It affects and divests the riparian rights otherwise attaching to public lands of the United States, solely because the act of Congress declares that grants of public lands shall be made subject to all water-rights that may have previously accrued to any person other than the grantee. An appropriation of water and use thereunder does not become effective to divest private rights in the stream, unless it has been continued adversely thereto for the period of five years under such circumstances as to gain a title by prescription, and then only to the extent of the use. The amount claimed in the notice is no measure of the right.

It follows that the attempted appropriation by S. J. Duckworth of a part of the water of the lake did not divest or affect the existing rights of the water company, either as riparian owners or by virtue of a prior appropriation or use. And so far as his claim was adverse to, and in conflict with, the prior rights and interests of the water company, it was entitled to a decree quieting its title against him and enjoining him from asserting such adverse title. This applies to the riparian right which attached to its strip of land partially surrounding the lake as well as to any other prior right which it possessed to the water. The fact that the company had not used the water on this narrow strip did not affect the riparian right. A riparian right is neither gained by use nor lost by disuse. And for the protection of these riparian rights the water company is entitled to a judgment declaring Duckworth's appropriation subject to the riparian rights pertaining to its lands and subject to all other prior rights of the water company, so that the continued use of the water by Duckworth shall not be adverse and shall not ripen into an easement which, in effect, would divest the rights of the water company. (*Moore v. Clear Lake W. Co.*, 68 Cal. 146, [8 Pac. 816];

Stanford v. Felt, 71 Cal. 249, [16 Pac. 900]; *Heilbron v. Fowler S. C. Co.*, 75 Cal. 426, [7 Am. St. Rep. 183, 17 Pac. 535]; *Conklin v. Pacific I. Co.*, 87 Cal. 296, [25 Pac. 399]; *Walker v. Emerson*, 89 Cal. 456, [26 Pac. 968]; *Spargur v. Heard*, 90 Cal. 221, [27 Pac. 198]; *Anaheim U. W. Co. v. Fuller*, ante, p. 327, [88 Pac. 978], decided 1907.)

7. We have said that, because of the McKinlay deeds, and so far as the claim of plaintiffs as riparian owners is concerned, the water company can use the water for any purpose, at any place, and in any quantity which leaves plaintiffs enough for stock and domestic purposes. But the mere fact that the company is a riparian owner on the lake gives it no right whatever to the water of the lake, except for actual beneficial use upon the land to which the riparian rights attach. The evidence does not show that it is using the water on that land at all. It is carrying the water to other lands and places for use and sale. The admission of the pleadings above referred to relieves it of the necessity of establishing its right to do this, except as it may be affected by evidence in support of the specific rights alleged by the plaintiffs. But the right it actually exercises is not a right derived from the fact of its riparian ownership of the greater part of the lake shore and bed.

8. The claim of the respondents that the grant by Mrs. McKinlay of the rights pertaining to the land described in the deeds extended only to the water then standing in the lake, and that as soon as that water was exhausted by use, run-off, or evaporation, the rights ceased to exist, is utterly baseless and needs no discussion further than to deny it.

9. In its conclusions of law the court declared that the defendants are estopped from claiming any rights under the McKinlay deeds. We find nothing in the evidence justifying this conclusion. The plaintiffs did not make an adverse claim until November, 1902, and the water company, about the same time, served on them written notice of its claim to the water under the said deed. This may not have been necessary, but it undoubtedly prevented any estoppel from arising in their favor by reason of any subsequent expenditure of money by them in the diversion of water in pursuance of their adverse claim, granting that such expenditure would otherwise have created an estoppel.

10. We have said that the water company is entitled to a judgment protecting its riparian right, although it has not used, and does not immediately propose to use, the water on its riparian land. This rule does not apply to any right which it has acquired by appropriation or use upon other lands, and this appears to be the source of the right which it has been exercising. Such right depends upon use and ceases with disuse. (Civ. Code, sec. 1411.) It extends only to the water actually taken and used. The consequence is that, so far as the protection of this right and the water necessary to supply this use are concerned, the water company is not entitled to prevent an appropriation or use by others of the surplus of the waters of the lake, if there is any. So long as there is enough to supply it with the quantity of water which it has been so using, it has, in the protection of this right, no concern with the disposition of the remainder. It has the right, of course, to insist upon a reasonably ample quantity to last through the entire season, until rains renew the supply, and also to enjoin a depletion of the lake which will lower the water surface so as to substantially increase the cost of making the diversion it is entitled to make.

11. It may be that upon another trial the sufficiency of the notice of appropriation posted by S. J. Duckworth may not be important. But as this cannot be decided here, it is necessary to notice the objections urged against it. The notice states that the water claimed therein is to be used for irrigation upon the land owned by Mrs. Duckworth, describing it. This is a sufficient statement of the purpose for which the water was claimed and the place of intended use, and it is not vitiated by the additional statement in the notice that it was also to be used for irrigation by other parties to whom Duckworth might furnish it upon other land, which was not described. It was a good notice for the appropriation of water for use on the place designated, at all events. It states that the water is to be conveyed to the place of use "by a six-inch pipe, or by a pipe of other dimensions." This we consider sufficient to authorize a diversion of the quantity that could be carried in a six-inch pipe, and not exceeding the two hundred and fifty miners' inches claimed as the maximum. Whether or not it would justify a diversion within the amount limited if carried in a pipe more than six inches in diameter,

is a question not presented, inasmuch as it does not appear that such pipe was proposed to be used.

12. It is claimed by the respondents that they acquired their title from Mrs. McKinlay to the land in question by purchase for a valuable consideration, and without actual notice of the deeds to Smith and Montague, and that the record of those deeds is ineffectual to constitute constructive notice to them, because the acknowledgment of each deed is defective. The acknowledgments were made before a notary public. The certificates recite his name and official character in the usual form. They are signed by him with the addition of the words "Notary Public" after his signature. The code requires that the officer certifying to an acknowledgment must affix thereto his signature, followed by the name of his office. (Civ. Code, sec. 1193.) The objection is that the words "Notary Public" are not a sufficient statement of the name of the office. The certificates in question begin thus: "State of California, Monterey County, ss.," and each recites that "before me, John Ruurds, notary public in and for said Monterey County, personally appeared," etc. In view of this statement we think the name of the office is sufficiently stated after the signature. There is nothing in *Emeric v. Alvarado*, 90 Cal. 479, [27 Pac. 356], that is in conflict with this conclusion. In that case the body of the certificate stated that the officer was a notary public of the city and county of San Francisco, while the name of the office after the signature was given as "Notary Public, Contra Costa County." The officer was in fact a notary public of Contra Costa County and the acknowledgment was taken in that county, though the contrary was stated in the certificate. It was held that the certificate was invalid because it did not, in the body of it, truly recite the "name and quality of the officer" or the venue, as the law required, and that the words "Notary Public, Contra Costa County" following the signature, were not sufficient to make it good. The two statements were inconsistent, and the certificate afforded no means of ascertaining which was correct. Here there is no inconsistency, and the statement after the signature, construed according to the ordinary usage of the language, and in connection with the recital, means that the person signing was a notary public of Monterey County. This is the proper construction, and therefore it does correctly state the name of the office as the code prescribed.

In conclusion, we deem it proper to say that, upon another trial, if the court shall decide that either of the parties possesses rights to the water, acquired by appropriation under the statute or by diversion and use, it will be necessary to ascertain and declare the amount of water covered by the right owned by each respectively.

It is not necessary to mention the other points discussed in the briefs.

The judgment is reversed and a new trial ordered.

Angellotti, J., Sloss, J., McFarland, J., Henshaw, J., and Lorigan, J., concurred.

Rehearing denied.

[S. F. No. 4216. In Bank.—February 8, 1907.]

GERTRUDE JOHNSTON, by her Guardian ad Litem,
Respondent, v. SOUTHERN PACIFIC COMPANY,
Appellant.

ACTION BY MINOR FOR NEGLIGENCE—ERRONEOUS APPOINTMENT OF GUARDIAN AD LITEM—CONSENT NOT PRESUMED.—In an action by a minor aged sixteen years for injuries from alleged negligence of the defendant the appointment of a guardian *ad litem* by the superior court, not made as required by section 373 of the Code of Civil Procedure, upon application or nomination of the minor, but made solely on the application of the person appointed, is erroneous. It cannot be presumed upon appeal, against the record, that the consent of the minor was given to the appointment; and the error shown by the record, being jurisdictional, would, if not cured, necessitate a reversal of the judgment.

ID.—CURE OF ERROR—AFFIRMANCE AFTER MAJORITY PENDING APPEAL.—

The error must be deemed cured where it appears that the minor attained majority pending appeal before the hearing, and upon the hearing affirmed all that had been done in her behalf, and declared her willingness to be bound in all future matters by the proper judgments and orders of the court.

ID.—PERMANENT INJURIES TO PLAINTIFF—TESTIMONY OF ATTENDING PHYSICIANS—POWER AND DUTY OF COURT TO ORDER PERSONAL EXAMINATION.—Where the plaintiff seeks recovery for permanent injuries which are objective and physical, and offers the testimony of attending physicians to prove the nature and extent of the injuries sus-

tained, the court has power, and it is its duty, to order a physical examination in the presence of plaintiff's physicians and the physicians of the defendant, to ascertain the nature and extent of such injuries.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

A. A. Moore, for Appellant.

Clark & Clark, and D. M. Delmas, for Respondent.

HENSHAW, J.—This action is to recover damages for personal injuries sustained by plaintiff, who was a passenger upon the cars of the defendant. The negligence charged is that defendant suddenly and violently started a train from which plaintiff was about to alight, whereby she was hurled to the ground, sustaining a fracture of the skull, hemorrhage of the brain, and other injuries. Plaintiff at the time of the commencement of her action was sixteen years of age. Section 373 of the Code of Civil Procedure provides that "when a guardian *ad litem* is appointed by the court he must be appointed . . . when the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years." The record shows that a petition was presented to the court by Charles Manson for the appointment of himself as guardian *ad litem* of Gertrude Johnston, a minor; that the petitioner is the stepfather of the minor, and that the minor is of the age of sixteen years. The order of the court made upon the petition declares "it satisfactorily appearing to the court from the petition of Charles Manson that he is the stepfather of Gertrude Johnston, a minor, aged sixteen years, and that the minor is about to commence an action etc., . . . and that it is necessary that a guardian be appointed for her for the purpose of maintaining this action. Therefore, it is ordered that Charles Manson be and he is hereby appointed guardian *ad litem* for the purpose of this action." The due appointment of the guardian was pleaded in the complaint. An issue was joined upon this allegation

by the answer. Upon the trial, by various motions and objections, defendant raised the question of the due appointment of the guardian, and of the right of the plaintiff to proceed with her action under the appointment disclosed. These objections were overruled, and here present the first proposition for consideration.

Respondent, in answer to the plaintiff's objection, urges that as the proceedings were before a court of record, every reasonable presumption will be indulged in to support the order which the court made, and that in indulging in such presumption it will even be assumed that the minor was present and orally requested the appointment to be made. There is, however, a well-defined limit to an appellate tribunal's power in indulging in such presumptions. It can indulge in no presumption which does violence to the facts as presented by the record of the inferior court, and while it is true that an order of a court of general jurisdiction will be treated as void only in the event that its invalidity appears upon the face of the record, ever since the case of *Hahn v. Kelly*, 34 Cal. 391, [94 Am. Dec. 742], the rule in this court has been well settled that this does not mean that the record must contain a direct statement to the effect that something which must have been done in order to give the court jurisdiction was not done, but means that want of jurisdiction appears whenever what was actually done is stated, and this which was done is not sufficient in law to confer jurisdiction. Therefore, whenever the record states the evidence or makes an averment with reference to a jurisdictional fact it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact or that the fact was otherwise than is averred. (*Galpin v. Page*, 18 Wall. 350; *Smith v. Los Angeles etc. Co.*, 98 Cal. 210, [33 Pac. 53].) It must be conclusively presumed, therefore, in accordance with the express declaration of the trial court in its order, that it appointed a guardian *ad litem* of a minor sixteen years of age upon the application of the guardian alone, and that the minor never exercised, nor was given an opportunity to exercise, her right of nomination. Under these circumstances, is the order valid or erroneous, and, if erroneous, is it error curable, or such as to render the appointment void?

Unquestionably the order appointing the guardian was erroneous. Not only was it made in violation of the express direction of the statute, but as made it denied to the minor a substantial right of nomination accorded her by law. Indeed, there is very respectable authority for holding that the minor's right of nomination under a statute such as our own must be exercised, or good reason be shown for its non-exercise, else the appointment is void. Such a view of the law makes the nomination a jurisdictional prerequisite. (*Palmer v. Oakley*, 2 Doug. (Mich.) 433, [47 Am. Dec. 41].) The decisions of the courts which adopt the view of *Palmer v. Oakley* are in no sense technical, but rest upon the well-recognized disabilities of infancy and the protection which the law always accords to minors. So fully is an infant under the protection of the law that the courts will not allow his rights to be prejudiced by any act either of his own or of any other person. (10 Ency. of Plead. & Prac., p. 589.) Being in their nonage, and lacking the power generally to make contracts, infants cannot contract with or be represented by attorneys at law. So that, in general, if an action has been prosecuted on behalf of or against an infant without due observance as to the appearance of the infant either by guardian, *prochein ami*, curator, or some other legally authorized person, the right of disaffirmance of such a judgment rests with the minor until barred by his laches after attaining his majority. For even laches is not imputable to a minor. (*Tucker v. McBean*, 65 Me. 352; *Smith v. Sackett*, 10 Ill. 534; *Chandler v. McKinne*, 6 Mich. 217, [74 Am. Dec. 686].) Upon the other hand, since this right of disaffirmance remains with an infant plaintiff or defendant thus irregularly made a party to an action, it is clearly unjust that the adverse party under objection should be compelled to litigate under circumstances where the judgment would be binding against him and not binding against his adversary. Therefore, it is, as it should be, the general rule, even in jurisdictions which do not hold that irregularities in the proceedings touching the appointment of the guardian *ad litem* render the judgment void, that the error is of such gravity as to necessitate a reversal of the case when such a situation is presented,—namely, a situation where the judgment is by law binding upon one litigant and may be disaffirmed because of infancy.

by the other. For it is of the very essence of a just judgment under our system of jurisprudence that the rights, duties, obligations, and privileges which spring from it should bear with even and exact pressure upon all the parties to it.

Other states, however, have adopted a rule of decision in conflict with that laid down in *Palmer v. Oakley*, 2 Doug. (Mich.) 433, [47 Am. Dec. 41], and amongst those states is our own. It has long and consistently been held in this state that a failure to appoint a guardian *ad litem*, or to sue by one, while irregular, is only that; that the defect is not a jurisdictional one, and therefore the judgment is not void. Thus, in *In re Cahill*, 74 Cal. 52, [15 Pac. 364], a contest of a will was commenced by a minor *in propria persona*. This court considered the question with some elaboration and held that the proceedings were not void for want of jurisdiction, and that it was proper after the commencement of the proceeding to appoint a guardian *ad litem* at the trial. In *Childs v. Lanterman*, 103 Cal. 387, [42 Am. St. Rep. 121, 37 Pac. 382], it was held that a judgment against an infant in an action in which no guardian *ad litem* had ever been appointed was not void; that the appearance by an attorney, notwithstanding the fact that an infant by reason of infancy could not authorize an appearance by an attorney, would be held "as authorized by him so far as the direction and consent of the infant can give authority." And as the infant after reaching majority had not disaffirmed the judgment, he had waived his right thereafter to make such objection. In *Foley v. California Horseshoe Co.*, 115 Cal. 184, [56 Am. St. Rep. 87, 47 Pac. 42], the complaint averred the appointment of a guardian *ad litem*, the averment was traversed by the answer, and the court upon trial held the appointment void, and then and there made an order appointing a guardian *ad litem*. It was held that the action should not abate, and that the appointment of a guardian *ad litem* after action begun was within the power of the court.

To sum up on this proposition, therefore, were it not for a saving fact hereafter to be considered, it would be held that the appointment of the guardian *ad litem* in this case was so irregular as to justify a repudiation and disaffirmance by the minor, had the judgment been adverse to her. Such a judgment would lack the mutuality of responsibility and

obligation which must belong to every valid judgment, and as the defect was called to the attention of the trial court, and no offer made there to cure it, as was done in the *Foley* case, a reversal of the judgment would be necessitated. But it was made to appear to this court upon the hearing that the minor had now attained her majority, and made and declared her affirmance of the proceedings which had been taken and her willingness to be found in all future matters by the proper judgments and orders of the court. Here, then, is the situation which was presented in *Childs v. Lanterman*, 103 Cal. 387, [42 Am. St. Rep. 121, 37 Pac. 382]. From this point on, whatever orders or judgments may be made and given are fully binding upon this plaintiff, who has attained her majority. The defendant, therefore, is protected by such judgments and orders in all of its rights, and the objection based upon irregularity in the appointment of a guardian *ad litem*, substantial as it was when made, is thus removed. And we hold upon this proposition that for the reason appearing,—namely, the attainment of majority by the minor and her affirmance of the action,—no reversal of the judgment is called for.

Plaintiff offered proof touching the nature of her injuries, that it had been necessary to remove a portion of the skull. Physicians were called on her behalf to testify to this and to other matters of personal injury connected with it. The case presented was that of a plaintiff complaining of and seeking damages for objective physical injuries. Defendant requested of plaintiff that an opportunity be offered it to have a physical examination of the person of the plaintiff to be conducted by two physicians, plaintiff being permitted to have her own physicians present and to select a reasonable place for the examination. This application was first made in the form of a request to plaintiff, and was refused by her attorneys. It was then addressed to the discretion of the court, and an order was asked to that effect. No objection was made that the application was not timely; that the physicians selected were not reputable; or that the circumstances in any way or for any reason were other than modest and proper. Indeed, the court in ruling, as shown by the record, declared that if the authorities bore out defendant's contention, it would make the order. Its refusal to make the order, there-

fore, was founded upon the belief that it was powerless so to do. This is the first time this question has come before the court for adjudication, and what is here said must be regarded as applicable strictly to civil actions. It is a principle of criminal law that the defendant may not be compelled to give evidence against himself. In civil actions, where a plaintiff is seeking affirmative relief, the adverse party may compel him to give such evidence even to becoming a witness. As to the power of a court to order such examination in proper cases, the overwhelming weight of authority is that it exists. The supreme court of the United States substantially alone has denied the power in *Railroad Co. v. Botsford*, 141 U. S. 250, [11 Sup. Ct. 1000]. In *Brown v. Chicago etc. Ry. Co.*, 12 N. Dak. 61, [102 Am. St. Rep. 564, 95 N. W. 153], the Botsford case is reviewed. It is said that it is not authority in a state court, and that the reason of the rule as to federal courts comes from the fact that all United States courts other than the supreme court must in the absence of statute follow the mode of proof as it existed in actions at common law. In *Camden etc. Ry. Co. v. Stetson*, 177 U. S. 172, [20 Sup. Ct. 617], is found another modification of the rule as declared in the Botsford case, it being held that the practice of the particular state will govern the federal procedure. Upon this an order of the circuit court directing a physical examination of plaintiff was affirmed. By the state courts, however, with unusual unanimity, it is held that courts have the power to order such examinations, and should exercise it with a sound discretion. In some states, as in New York, the matter is controlled by statute, but where it is not a matter of statute the courts are singularly uniform in declaring the existence of the power. In but four states—namely, Illinois, Massachusetts, Texas, and Montana—is the power denied. It was denied in New York, but has been granted by statutory enactment. Our Code of Civil Procedure (sec. 128, subd. 5) prescribes that "Every court shall have power: . . . To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto." Under a statute identical in terms with this, it was held by the supreme court of Georgia that if statutory authority was

necessary for the making of such an order it is here found. (*Richmond etc. R. R. Co. v. Childress*, 82 Ga. 719, [14 Am. St. Rep. 189, 9 S. E. 602].) Says the supreme court of Minnesota: "To allow the plaintiff in such cases to call in as many friendly physicians as he pleases, and have them examine his person and then produce them as expert witnesses upon the trial, but at the same time to deny the defendant the right in any case to have a physical examination of plaintiff's person and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call constitutes a denial of justice too gross in our judgment to be tolerated for one moment." (*Wanek v. City of Winona*, 78 Minn. 98, [79 Am. St. Rep. 354, 80 N. W. 851].) Says the supreme court of Indiana in *City of South Bend v. Turner*, 156 Ind. 418, [83 Am. St. Rep. 200, 60 N. E. 275]: "When serious and permanent injuries are claimed by the plaintiff, and he or she has submitted to an examination by a chosen physician or surgeon, who appears as a witness in plaintiff's behalf, and the nature, extent and effect of the injury are to be deduced from objective conditions, and so fully from no other source, no degree of sentiment will justify the refusal of the motion. When it becomes a question of probable violence to the refined and delicate feelings of the plaintiff, on the one hand, and probable injustice to the defendant on the other, the law will not hesitate; the court in making such orders in respect to time, place and person, in every case having such due regard for the feelings of the plaintiff and proprieties of the case as the ends of justice will permit." To the same effect may be cited: *Schroeder v. Chicago etc. Ry. Co.*, 47 Iowa, 375; *White v. Milwaukee etc. Ry. Co.*, 61 Wis. 536, [50 Am. Rep. 154, 21 N. W. 524]; *Shaw v. Van Renssalaer*, 60 How. Pr. 143; *Miami etc. T. Co. v. Baily*, 37 Ohio St. 104; *A. T. and S. F. Ry. v. Thul*, 29 Kan. 466, [44 Am. Rep. 659]; *Stuart v. Havens*, 17 Neb. 211, [22 N. W. 419]; *Sibley v. Smith*, 46 Ark. 275, [55 Am. Rep. 584]; *Railway Co. v. Underwood*, 64 Tex. 463; *Owens v. Kansas City*, 95 Mo. 169, [6 Am. St. Rep. 39, 8 S. W. 350]; *Railroad Co. v. Childress*, 82 Ga. 719, [14 Am. St. Rep. 189, 9 S. E. 602]; *Hess v. Lowery*, 122 Ind. 225, [17 Am. St. Rep. 355, 23 N. E. 156]; *Hess v. Railroad Co.*, 7 Penn. Co. Ct. Rep. 565; *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71, 79, [24 Am. St. Rep. 764, 8 South. 90]; *Graves v. Bat-*

tle Creek, 95 Mich. 266, [35 Am. St. Rep. 561, 54 N. W. 757]; *Demenstein v. Richardson*, 2 Penn. Dist. Rep. 825; *Marler v. Springfield*, 65 Mo. App. 301; *Belt Elec. Line Co. v. Allen*, 102 Ky. 551, [80 Am. St. Rep. 374, 44 S. W. 89]; *Lane v. Spokane R. Co.*, 21 Wash. 119, [75 Am. St. Rep. 821, 57 Pac. 367]; *South Covington Railway Co. v. Stroh*, (Ky.) [66 S. W. 177], 57 L. R. A. 875; Thompson on Trials, par. 859; Jones on Evidence, pars. 396-399; Fetter on Carriers of Passengers, par. 460, p. 1138; 7 Am. & Eng. Ency. of Law, pp. 507, 508, and cases cited; Elliott on Evidence, p. 1237, and late cases cited. In the case at bar, as has been said, the court refused the application for lack of power. We are not left in doubt as to what its action would have been had it believed it possessed the power, for the record discloses that the court believed it to be a proper case. Such an error so clearly affecting the substantial rights of the defendant necessitates a reversal of the action.

We have examined the other propositions presented by appellant, but deem them to be without substantial merit, but for the foregoing reasons the judgment and order are reversed and the cause remanded.

McFarland, J., Lorigan, J., Sloss, J., and Beatty, C. J., concurred.

Rehearing denied.

[Crim. No. 1350. In Bank.—February 8, 1907.]

THE PEOPLE, Respondent, v. FRANK WILLARD,
Appellant.

CRIMINAL LAW—MURDER—INSANITY—COMMITMENTS TO ASYLUM—EVIDENCE—AFFIDAVITS—EXAMINATIONS—CERTIFICATES.—Upon a trial for murder, where the defense was insanity, and it appeared that defendant had been twice, prior to the day of the homicide, committed to a state hospital for the insane on account of alcoholism, and, after brief detention, had been discharged therefrom, the affidavits, reports of examining physicians and their certificates, upon those commitments, offered in evidence by the defendant, were properly rejected. The certificates were purely hearsay, and not admissible for any purpose.

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- 1D.—ABSENCE OF JUDGMENT-ROLL—COMMISSION A CREATURE OF STATUTE—STATUS NOT FIXED.—There is no judgment-roll upon the commitment of a person to a state hospital for the insane, in the sense that it determines conclusively anything. The commission of physicians established in each county is purely a creature of statute, to determine whether the mental condition of the person examined is such as to warrant his detention in the asylum for treatment. It is not intended as a tribunal in which the *status* of the alleged insane person is fixed.
- 1D.—COMMITMENT ON DAY OF HOMICIDE—PROTEST BY DEFENDANT—SUBSEQUENT DISCHARGE ON HABEAS CORPUS—EVIDENCE—PETITION AND PROOF.—Where the defendant was a third time examined and committed to the asylum on the day of the homicide, at the instance of deceased, against defendant's protest that he was not insane, and ought not to be sent there, and he subsequently voluntarily petitioned for a discharge upon *habeas corpus*, the petition presented, with its declaration as to his sanity, which it appears he read and understood, and his testimony on that question at the hearing, were admissible, as bearing on the question of his mental capacity when the homicide was committed.
- 1D.—DEFENSE OF INSANITY—RULE OF EVIDENCE.—It is a rule of evidence in this state that, where the defense of insanity is interposed against a criminal charge, the acts and conduct of the accused at the time of, and within a reasonable time before and after, the alleged criminal act is committed may be presented to the jury upon the question of insanity existing at the time of its commission.
- 1D.—ADMISSIONS OF DEFENDANT—CONSTITUTIONAL RIGHTS.—The admissions and statements of the defendant, and the testimony given by himself upon *habeas corpus* proceedings, bearing wholly on the question of his sanity, in which there is nothing that can be construed as amounting to a confession of guilt, are admissible against him, and are not violative of any of his constitutional rights not to be a witness in a criminal case against himself, whether they are voluntary or not.
- 1D.—REBUTTAL—ORDER OF PROOF—DISCRETION.—Where upon rebuttal of the insanity of the defendant some evidence was allowed to be offered which might have been given in chief, it was within the discretion of the court to allow a departure from the order of proof, and the fact of such departure constitutes no ground of complaint where no abuse of discretion affirmatively appears.
- 1D.—MISCONDUCT OF DISTRICT ATTORNEY—HONEST MISTAKE AS TO EVIDENCE—CORRECTION BY COURT.—An honest mistake by the district attorney as to evidence, as to which, after discussion, he was corrected by the judge, and which was not persisted in, does not constitute misconduct prejudicial to the defendant.
- 1D.—ARGUMENT OF DISTRICT ATTORNEY—INFERENCES FROM EVIDENCE.—It was not objectionable for the district attorney in his argument to speak of certain inferences and deductions from the evidence which

the jury should make where no statement was made of any facts which the evidence did not disclose.

ID.—BURDEN OF PROOF OF INSANITY.—Where the defense of insanity is relied upon, the burden of proof rests upon the defendant to establish that defense by a preponderance of evidence.

ID.—CONFLICTING EVIDENCE—SUPPORT OF VERDICT.—Where the homicide was admitted, and the evidence was conflicting as to the insanity of the defendant being such as would excuse him from crime, the verdict is sufficiently supported.

ID.—COMMITMENTS TO ASYLUM NOT CONCLUSIVE EXCUSE FOR CRIME.—The several commitments of the defendant to the insane asylum do not prove that he was insane to the extent that the law would exempt him from responsibility for his criminal acts. A person may be partially insane upon one or several subjects, and for that reason be a proper person for confinement in a state insane asylum, to be cared for and treated for his mental disorder, and yet at the same time such person may be perfectly sane upon all other subjects and entirely responsible under the law for a criminal act committed by him.

ID.—INSANITY, WHEN AND WHEN NOT A DEFENSE.—That insanity may be available as a defense to a crime charged it must appear that the defendant when the act was committed was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. Although he may be laboring under partial insanity, or an insane delusion, yet if he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, and to know that it is wrong and criminal and will subject him to punishment, he must be held responsible for his conduct.

ID.—EFFECT OF LAST COMMITMENT—EVIDENCE OF RATIONALITY—PRISON THREAT—QUESTION OF FACT FOR JURY.—The commitment of the defendant to the asylum on the day of the homicide as being dangerous and laboring under an insane delusion is not conclusive, where there is counter evidence that he was rational on that day and prior and subsequent thereto, and also evidence to show that when last previously discharged he had threatened to kill any one who would send him there again. Under such evidence, it was a question of fact for the jury to determine whether at the time of the homicide defendant was insane, and to what extent; and their verdict that he was then sufficiently sane to be responsible therefor will not be disturbed.

APPEAL from a judgment of the Superior Court of Mendocino County and from an order denying a new trial.
A. G. Burnett, Judge presiding.

The facts are stated in the opinion of the court.

T. L. Carothers, and Charles M. Mannon, for Appellant.

U. S. Webb, Attorney-General, C. N. Post, Assistant Attorney-General, E. B. Power, Deputy Attorney-General, and Robert Duncan, District Attorney, for Respondent.

LORIGAN, J.—The appellant was tried in Mendocino County for the alleged murder of J. H. Smith, the sheriff of that county.

The immediate circumstances attending the killing of deceased, although by no means the only evidence in the case, are undisputed. The defendant, a man forty-two years of age, was born in Mendocino County, and had lived there practically all his life. He had been twice committed by the judge of the superior court of Mendocino County, after examination as to his sanity held in the city of Ukiah, to the Mendocino state hospital for insane, in both instances on account of alcoholism, and after remaining there a short time had recovered and been discharged from the asylum, his second discharge occurring some time in the early part of 1903.

On December 20, 1905, two days prior to the homicide, the defendant appeared in the city of Ukiah, and the deceased, as sheriff, having been informed that he was acting in a peculiar manner, brought him about 8:30 A. M. on December 22, 1905, to the sheriff's office. Leaving him there, the deceased at once repaired to the chambers of the judge of the superior court, where he made affidavit that the defendant was insane, and that it was dangerous for him to be at large. The judge doubtless thought the defendant would be brought before him, and fixed 9 o'clock of that morning as the time for the examination, and the defendant, having been formally arrested by deceased, was immediately brought into the judge's chambers for that purpose. Two physicians were summoned as medical examiners, and after an examination had they reported to the judge of the superior court that the defendant was insane and "homicidal and dangerous." On this report defendant was adjudged insane by the judge of said court, and ordered committed to the Mendocino state hospital for the insane for care and treatment. Just as the judge was signing the order of commitment, defendant declared that he

was not insane; that he ought not be sent to the asylum—that it was an outrage. He became angry and started to leave the judge's chambers, whereupon the deceased followed to intercept him. As defendant approached the door he drew a pistol from his pocket, opened the door, and, as he stepped into the hallway, whirled and fired at deceased, who was some five feet from him inside the judge's chambers, and killed him. Defendant fled, and was pursued and captured where he had taken to the brush on the hillside about a mile and a half from the scene of the tragedy.

Upon the trial the jury returned a verdict of murder of the first degree, and, a motion for new trial having been denied, judgment of death was pronounced upon the defendant. He appeals from the judgment and from the order denying his motion for a new trial.

No attempt was made on the part of the defendant upon the trial to dispute the killing of the deceased under the circumstances detailed, the sole contention on his behalf being that he was irresponsibly insane at the time of the homicide, and the principal—it may be said all—testimony in the case was devoted to that subject.

Upon this appeal it is urged by appellant as grounds of reversal that the court erred in rejecting evidence offered by appellant on the question of his insanity, and in admitting evidence offered on the part of the prosecution on the same subject, and erred also in instructing the jury on the degree of proof required by appellant under the law to establish his insanity. It is also claimed that the district attorney was guilty of misconduct precluding the appellant from having a fair trial. Lastly, it is contended that on the question of the insanity of appellant, the evidence was so overwhelmingly in support of it that the verdict of the jury was contrary to the evidence and necessitates a reversal.

Proceeding now to a disposition of these points as they are presented, and, first, as to the alleged erroneous rejection by the court of testimony offered by appellant in proof of his insanity.

It appeared from the evidence, as a fact, that the defendant had been three times committed to the Mendocino state hospital for insane, the first commitment being on February 2, 1901, the second on May 29, 1902, (these being the times

of commitment heretofore referred to,) and the third on the morning of the homicide. In connection with the testimony of the medical superintendent of said hospital, who testified to the fact of such commitments, the attorneys for defendant offered in evidence all the proceedings pertaining to each of these three insane examinations of appellant, which consisted of the complaint charging his insanity, the warrant of arrest, report of the medical examiners, their certificate, and the judgments and orders of commitment by the judge of the superior court. To the offer of all the documents pertaining to the examination of December 22, 1905, the people raised no objection and they were admitted. As to the admission of all of the documents pertaining to the two prior examinations, except as to the judgment and order of commitment in each case to which no objection was raised, the court sustained the objection of the district attorney. This ruling is claimed to have been erroneous, but we think it was correct. We do not determine on this appeal whether the judgments and orders of commitment which were admitted in evidence would have been admissible if objection had been interposed against their admission. No objection was made to any of them by the district attorney, and hence the question of their admissibility is not involved on this appeal, except in as far as that question is affected by discussing the admissibility of the other documents. As to the other documents which appellant insists should have been admitted,—the affidavit, report of examining physicians, their certificates, etc.,—the court was clearly right in rejecting them. The certificates were purely hearsay evidence and were not admissible for any purpose. It is contended by appellant that all these proceedings constituted a judgment-roll. There is nothing in this contention. In a proceeding such as is in question here, there is no judgment-roll, in the sense that it determines conclusively anything. The statute provides for a commission in each county in the state, consisting of at least two physicians and a judge of the superior court of the county, whose duties in the examination of one alleged to be insane are limited and confined to the specific purpose,—viz. to ascertain whether such alleged insane person is a proper subject to be admitted for care and treatment to the insane asylums of the state. This commission is purely a creature of the statute. It is not intended as, and

is not, a tribunal in which the *status* of the alleged insane person is fixed, but simply a commission which determines whether the mental condition of the person it has examined is such as warrants his detention in the asylum for treatment. From these considerations we are satisfied that the ruling of the court, as far as it went, was correct.

It is further claimed by appellant that the court erred in admitting, over his objection, a petition for a writ of *habeas corpus* made by him, and likewise his testimony given on the hearing thereof. It appears that defendant was placed in the Mendocino state hospital under the commitment of December 22, 1905, on that date. Thirteen days thereafter a petition for a writ of *habeas corpus* was presented to the superior court of Mendocino County, signed by appellant himself. In it he stated that on December 22, 1905, he was committed to the Mendocino state hospital as an insane person, and that he "is now sane," and prayed for his discharge from said hospital. We think the petition was admissible. As the order of December 22, 1905, committing him to the hospital had been introduced in evidence, it was proper for the people to show by the records of the court that he had been discharged therefrom, in order that the prosecution might not be placed in the attitude of trying the appellant for murder while he was detained by the medical superintendent of the hospital under the commitment as insane. It is true that, previous to the offer, the superintendent of the hospital had testified that appellant had been discharged from the hospital on *habeas corpus* proceedings, but this was only cumulative evidence, and did not affect the admissibility of the record. Aside from this, however, the making of this petition was the voluntary act of the appellant, and the evidence shows that he read and understood it when it was presented. This being true, and being an act done by him within a short time after the homicide, the fact of its presentation, and the declarations of the defendant made in it, were admissible as bearing on the question of the mental condition of the appellant at the time the homicide was committed. It is a rule of evidence in this state that where the defense of insanity is interposed against a criminal charge the acts and conduct of the accused at the time, and within a reasonable time before and after, the alleged criminal act is committed may be presented

to the jury upon the question of insanity existing at the time of its commission. (*People v. Lee Fook*, 85 Cal. 300, [24 Pac. 654]; *People v. McCarthy*, 115 Cal. 260, [46 Pac. 1073]; *People v. Zeigler*, 142 Cal. 338, [75 Pac. 1090].)

Within the rule of these authorities, the claim of appellant that the admission in evidence of his testimony taken on the hearing of said petition was error must also be disposed of against him. This testimony was admitted solely on the question of the mental condition of the appellant, and within that limitation was properly admitted. With reference to the admission of this evidence, it is insisted that by permitting its introduction it was in fact compelling the appellant "in a criminal case to be a witness against himself," contrary to the provisions of amendment V of the federal constitution, and of article I (sec. 13) of the constitution of this state. There is no merit in this claim. The *habeas corpus* proceedings were not instituted by any public authority or by any friend on behalf of appellant, but by appellant himself, and it fairly appears from his own statement, while testifying in the *habeas corpus* proceeding, that he was informed by the district attorney that, were he discharged under it, he would still be prosecuted for the killing of deceased. He was not required to take the stand at the hearing on the application for the writ; he was under no compulsion whatever, but, as the record shows, was sworn on his own behalf. Under such circumstances it cannot be said that the introduction of his testimony given on the *habeas corpus* proceedings was in effect at all violative of any of his constitutional rights. Not only was the testimony voluntarily given and the proceeding inaugurated solely by himself, but, when his testimony as there given is examined, there is nothing in it which can be construed as a confession or admission of guilt, and it is established as the rule in this state that the admissions or statements made by the defendant which do not amount to a confession of guilt are admissible against him, whether they are voluntary or not. (*People v. Le Roy*, 65 Cal. 613, [4 Pac. 649]; *People v. Knowlton*, 122 Cal. 357, [55 Pac. 141]; *People v. Miller*, 122 Cal. 84, [54 Pac. 523].)

Complaint is further made as to the admission in rebuttal of certain evidence offered by the prosecution. Most of it, particularly on the question of the insanity of appellant, was

properly evidence in rebuttal. As to the rest of it, it is apparent that it would have been admissible if offered in chief. The fact that it was permitted to be given in rebuttal constituted of itself no ground of complaint. A court is warranted in departing from the order of proof prescribed by section 1093 of the Penal Code under proper circumstances. Whether it shall permit such departure is a matter committed to its sound discretion, and its action in that regard is not ground upon which error may be predicated, unless the discretion appears to have been grossly abused, and this abuse must affirmatively appear. (Pen. Code, sec. 1094; *People v. Gordan*, 103 Cal. 568, [37 Pac. 534].) There is no appearance of abuse in permitting the departure in the case at bar; hence, the point made is not well taken.

We have discussed all the rulings of the court made during the trial relative to the admissibility of evidence of which appellant complains and which we deem worthy of particular consideration. Some other objections on the same line are urged by appellant, but we do not think them tenable or requiring any special mention.

As to the other points urged. The claim of prejudicial misconduct on the part of the district attorney is, in our judgment, of no force. In his closing address to the jury the district attorney, in arguing the existence of possible malice of appellant against the deceased, stated that according to the two commitments in evidence the deceased had placed the appellant in the asylum. Exception was taken by appellant to this statement. After some discussion between court and counsel on both sides as to what the evidence was in that respect, the court declared that there was no evidence in the record to sustain the statement, and instructed the jury then and there to disregard the remarks of the district attorney concerning it. Thereafter no reference to the subject was made by the district attorney. It is apparent from the record that this statement of the district attorney was made in the honest belief that the evidence supported it, and, as the court immediately pointed out his error and instructed the jury to disregard it, we are satisfied that under those circumstances the conduct of the district attorney cannot be said to have been so prejudicial to the appellant as to warrant a reversal on that account. Verdicts will not be disturbed

merely on account of the inadvertent mistakes of counsel as to matters of evidence in addressing juries. It is only when from the course of conduct of a prosecuting officer it is apparent that the right of the defendant to a fair trial has been prejudicially invaded that he can successfully complain of it, and nothing of the kind appears here. (*People v. Ward*, 105 Cal. 340, [38 Pac. 945]; *People v. Putman*, 129 Cal. 262, [61 Pac. 961].)

As to the other matter concerning which misconduct by the same officer is specified, less need be said. It occurred also in his closing address. In his remarks no statement was made by him of any facts which the evidence did not disclose. The matters complained of were suggestions in his argument of certain inferences and deductions which the jury should make from particular evidence in the case. The exception was leveled against these deductions and inferences. This was no ground for exception. Counsel have a right to present to the jury their views of the proper deductions or inferences which the facts warrant. Their reasoning may be faulty, their deductions from the premises illogical, but this is a matter for the jury ultimately to determine, and not a subject for exception on the part of opposing counsel.

It is next insisted that the court erred in giving an instruction to the jury upon the subject of insanity,—that the burden of proof was upon the defendant to establish that defense, and that it must be established by a preponderance of evidence.

But this has been the established rule in this state practically since its earliest history, repeatedly affirmed by this court, so that it cannot be considered as open to further question. It was first established as the correct rule to be applied in this state in *People v. Myers*, 20 Cal. 518, and has been adhered to ever since. (*People v. Travers*, 88 Cal. 233, [26 Pac. 88], citing a list of cases sustaining the rule since *People v. Myers*, 20 Cal. 518; *People v. Bawden*, 90 Cal. 195, [27 Pac. 204]; *People v. McNulty*, 93 Cal. 443, [26 Pac. 597, 29 Pac. 61]; *People v. Bemmerly*, 98 Cal. 299, [33 Pac. 263]; *People v. Ward*, 105 Cal. 342, [38 Pac. 945]; *People v. Allender*, 117 Cal. 81, [48 Pac. 1014].)

We approach now the last point made by appellant,—that the evidence is insufficient to support the verdict. Counsel for

appellant make this contention in their brief without endeavoring to at all specify in what particulars it is insufficient; they simply state the point. We have, however, considering the gravity of the position of the appellant on this appeal, made a careful examination of the record to find if this claim of appellant finds support from it, and are satisfied that it does not. This court cannot disturb a verdict unless there is no evidence to support it, or where the evidence relied on by the prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the verdict as to convince this court that its return was the result of passion or prejudice on the part of the jury. In a case presenting any of these features this court would deal with it as a matter of law. Such a situation, however, can only be presented on appeal in extreme cases, and, notwithstanding the claim of appellant, the record before us does not disclose any such case. It presents the usual and ordinary situation where the evidence was conflicting as to the only real question in the case,—the insanity of the appellant,—and the jury finding against it, and their finding being supported by material evidence, is conclusive on this court.

The claim of counsel that on the subject of the insanity of appellant the evidence was so overwhelmingly in favor of it is, as we say, without foundation. This claim seems to be based on the several orders of commitment to the insane asylum. But it did not at all follow because appellant was so committed that the commitment was proof that he was insane to the extent that the law would exempt him from responsibility for his criminal acts. There are many kinds and degrees of insanity, and it is not every kind or degree which will relieve a person from such responsibility, and the degree of mental impairment which would authorize his confinement in an asylum for the insane may be entirely different from the degree of mental derangement which will relieve him from responsibility for his criminal acts. A person may be partially insane, or be insane upon one or several subjects, and for that reason be a proper person for confinement in a state insane asylum to be cared for and treated for his mental disorder, and yet at the same time such person may be perfectly sane upon all other subjects and entirely responsi-

ble under the law for a criminal act committed by him. (*In re Buchanan*, 129 Cal. 330, [61 Pac. 1120].)

That insanity may be available as a defense to a crime charged, it must appear that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. If he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment, he must be held responsible for his conduct. Although he may be laboring under partial insanity,—as, for instance, suffering from some insane delusion or hallucination,—still if he understands the nature and character of his action and its consequences,—if he has knowledge that it is wrong and criminal, and that if he does the act he will do wrong, such partial insanity or the existence of such delusion or hallucination is not sufficient to relieve him from responsibility for his criminal acts.

Now, while it is true that the appellant was committed to the insane asylum under two commitments prior to the last one of December 22, 1905, there was no evidence introduced to show that he was irresponsibly insane at those times within the rule as the law prescribes it. In fact, the evidence shows that on both these occasions he was suffering merely from acute alcoholism; that he was to some extent mentally deranged therefrom, but after he had been there from ten days to a couple of weeks he recovered, and was subsequently discharged from the asylum as cured.

As to the last commitment to the asylum—the one made on the morning of the homicide. The fact that the appellant had been ordered committed to the Mendocino state hospital for insane immediately prior to the homicide did not of itself exempt him from responsibility for the killing of deceased. He might have been suffering from partial insanity, such as would justify his detention in the asylum for care and treatment, and still, as we have seen, not be insane to such an extent as to be deemed irresponsible in law for his conduct. The fact that he was committed to the asylum did not conclusively establish the fact that he was insane at all. Notwithstanding the commitment, it was a question for the jury to determine whether he was in fact insane, and to what ex-

tent. They were in no wise concluded by the report of the medical examiners that appellant was insane, or by the opinion of the medical examiners as to the nature of his insanity, or by the judgment which declared him insane and ordered him committed to the asylum. The report of the medical examiners and the judgment and order of commitment, being before them, were to be regarded by the jury only as evidence bearing on the question of insanity. These were to be considered by them, but what weight or credibility, if any, they should give them was entirely a matter for their determination.

Now, as to the judgment and commitment of the morning of December 22, 1905. It appears from the testimony of the examining physicians given on the trial that they believed from the evidence adduced at the medical examination, and so stated in their medical report, that the appellant was the subject of an insane delusion,—namely, that he was appointed by President Roosevelt and Governor Pardee a peace officer to arrest people or evil-doers. They testified that during the examination upon all other subjects he talked rationally and appeared to be sane.

As to the statement in the report of their examination of appellant that he was "homicidal; dangerous," they testified that this statement was made by them in response to one of the questions contained in a blank form for medical examinations in insanity cases prescribed by the state commission in lunacy. The question prescribed in that form was: "Is alleged insane person noisy, restless, violent, dangerous, destructive, incendiary, excited or depressed, homicidal or suicidal?" It was in response to this inquiry that the examining physicians answered "homicidal; dangerous." As a witness on the trial, testifying as to the medical examination of appellant, Dr. Bond, a physician who acted as one of the medical examiners, and who gave the answers to be written down, said that during the examination of appellant, after the latter had stated that he was appointed by President Roosevelt and Governor Pardee as a peace officer to arrest evil-doers, he asked him if he would kill a person in the exercise of his duties as peace officer,—whether he would kill a wrong-doer if he had him under arrest,—whether he would injure him in any way,—to which appellant responded that

he would kill him if necessary; that this inquiry and the answer of appellant furnished the basis for stating that he was "homicidal; dangerous." Upon the trial four other witnesses testified to other conversations with the defendant, having for their basis this apparent delusion of being appointed as a peace officer by the president and governor, and that in these conversations defendant, in their judgment, talked irrationally. This was practically all the evidence offered on the part of the defense to sustain the plea of insanity.

Upon the part of the prosecution a number of persons were called who had known defendant intimately a number of years prior to the homicide, who testified that he was rational during all the time they knew him. A large number of witnesses testified to the conduct of the defendant immediately subsequent to the homicide, and that he was entirely rational. And the assistant medical superintendent in charge of the asylum to which appellant was taken on the day of the homicide under the commitment of that date, who examined, observed, and talked with him while he was there, testified that during all of the time he was there he was perfectly rational. Attendants at the asylum, who observed and conversed with him, testified likewise. The physicians who examined him at the hearing on December 22, 1905, testified, as we have already said, that upon every other subject than the delusion referred to he was sane, and the superior judge who presided at that examination testified that except as to that delusion defendant appeared to be entirely rational. There was further evidence in the case that several years before the day of the homicide appellant had stated that he would kill anybody who would try to put him in the asylum again, and the day before the homicide made the same declaration.

This is a general statement of the evidence presented on both sides. We do not deem it necessary to go into detail, and state it only as far as we have, to show that there was no such preponderance of evidence in favor of the insanity of appellant as is claimed by his counsel, but, on the contrary, there was a clear and marked conflict in the evidence on this issue.

The trial court fully and fairly instructed the jury on the law of insanity as applied to the evidence in the case, with special instructions for determining the responsibility of one suffering from an insane delusion, if they found it existed.

Under the conflicting evidence in the case, and applying the instructions to it, the jury in returning a verdict of guilty determined that the appellant was sane. The evidence on behalf of the prosecution, if believed by the jury, warranted them in doing so, and we cannot disturb their conclusion.

This disposes of all the points made on the appeal, and no reason appearing for the reversal of the judgment, it and the order denying the motion for a new trial are affirmed.

McFarland, J., Angellotti, J., Sloss, J., Henshaw, J., and Shaw, J., concurred.

Rehearing denied.

[L. A. No. 1705. Department Two.—February 13, 1907.]

THE PEOPLE ex rel. CITY OF LOS ANGELES, Appellant,
v. LOS ANGELES INDEPENDENT GAS COMPANY,
Respondent.

GAS COMPANY—USE OF GAS FOR HEATING AND COOKING—FRANCHISE NOT FORFEITED.—A gas company having the right and franchise to lay pipes in the streets for the purpose of supplying illuminating gas to the inhabitants of a city, under section 19 of article XI of the constitution, does not forfeit its franchise by the supply of gas for cooking and heating as well as for lighting purposes which does not subject the streets to any additional burden.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, W. B. Mathews, and J. S. Chapman, for Appellant.

Lynn Helm, and Lee, Scott, Bailey & Chase, for Respondent.

McFARLAND, J.—This is a proceeding in the nature of *quo warranto* brought by the people of the state on the rela-

tion of the city of Los Angeles for the purpose of ousting and excluding the defendant, a corporation, from exercising a certain franchise. The main averment of the complaint is that defendant "has usurped and is unlawfully exercising the franchise of laying pipes in the public streets and alleys of said city of Los Angeles for carrying gas for heat and power, and of supplying and distributing, by means of said pipes, gas for heat and power to a large number of the inhabitants of said city." Judgment was for defendant, and plaintiff appeals from the judgment, and also from an order denying its motion for a new trial.

The material facts of the case, found by the court and supported by the evidence, are these: A year or two before the commencement of this action defendant had laid pipes under certain streets of the city of Los Angeles, through which it supplies illuminating gas for the use of the inhabitants of that city. It claimed the right and franchise to do this under section 19 of article XI of the state constitution. This section provides, in substance, that in any city where there are no public works for supplying water or artificial light, any individual or corporation shall, under the direction of the superintendent of public streets, and under such regulations as the municipality may prescribe, "have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof." The respondent complied with all the provisions of said section. It procured the gas with which it supplied the inhabitants of the city from another corporation, called the Los Angeles Suburban Gas Company, which furnishes defendant with illuminating gas, and this gas, without any chemical or other change, is supplied to defendant's customers. When used it necessarily generates both light and heat. The gas is delivered to the consumers at certain meters on their premises, and after it passes beyond the meters it is the property of the consumers and defendant has no further control over it. Some of these consumers use the gas not only for illuminating purposes, but

also for heating and cooking, and a few—not more than “one in fifty”—use it for heating purposes exclusively. It may be assumed that defendant knew that some of the gas furnished by it was used for heating as well as for illumination. And the contention of appellant is that the franchise of having pipes in the streets has been forfeited because the gas furnished by it has not been used for illumination alone, but has been used also for the other purposes above mentioned. This contention is, in our opinion, not maintainable. Indeed, this court has determined the matter adversely to appellant’s contention by its decision in *In re Johnston*, 137 Cal. 115, [69 Pac. 973], and in *Denninger v. Recorder’s Court*, 145 Cal. 629, 638, [79 Pac. 360]. In each of those cases the franchise of a party under said section 19 of the constitution to maintain pipes in the streets for distributing illuminating gas was attacked on the ground that the gas was being used for heating as well as for illuminating purposes. In the *Johnston* case the court said: “The suggestion on the part of the respondent that it is the purpose of the corporation herein to supply gas through its pipes for other purposes than light, even if founded upon fact, does not deprive it from exercising the right conferred upon it by the constitution, or authorize the municipality to prevent it from enjoying that right. Even though the pipes, when laid, may be available for other purposes than supplying gaslight, the corporation is not thereby deprived of the right which the constitution has given it to lay its pipes in the streets, nor can it be required as a condition of exercising that right to declare that the gas to be supplied by it shall be used exclusively for illumination, or is to be supplied solely for such use. It may be added that it is not made to appear that the streets will be subject to any other or greater obstruction than is requisite for the supplying of gas for illuminating purposes.” In *Denninger v. Recorder’s Court*, 145 Cal. 638, [79 Pac. 364], the court say: “Section 19 of article XI does not directly confer upon any individual or company the right to lay pipes and conduits in the streets of a city in order to supply gas for cooking and heating purposes, but only so far as may be necessary for supplying the city and its inhabitants with gaslight. The same gas, however, which furnishes light also serves for cooking and heating, and the pipes and connections necessary for the one purpose make the gas available

for the other purposes without subjecting the streets to any additional burden. It was accordingly held in *Ex parte Johnston*, 137 Cal. 122, [69 Pac. 973], that an intention to permit the use of gas for other than illuminating purposes afforded no ground for prohibiting the laying of the pipes by a party claiming the benefit of the constitutional grant." The burden and servitude, if any, which is imposed on the streets and public by the laying of the pipes is accomplished as soon as the pipes have been laid and the surface of the street restored to its proper condition; and that burden is in no way increased by the fact that the use of the gas carried through the pipe is not confined to illumination. Its use by some persons for heating purposes is a great convenience to those persons, while it is not a grievance to any one; and such use affords no just or legal reason for depriving respondent of its franchise.

Appellant contends for a reversal because it contends the findings are inconsistent. We do not see any inconsistency in the findings, and, at all events, none that are material. The fact is that there is only one material question in the case, and that is, Has the respondent forfeited its franchise because some of the gas distributed by it through its pipes has been used for heating purposes? This question is amply presented by the transcript, and it is not evaded by the minor points made by appellant. There is nothing in the other points which calls for special notice.

The judgment and order appealed from are affirmed.

Henshaw, J., and Lorigan, J., concurred.

[L. A. No. 1623. In Bank.—February 16, 1907.]

W. F. BAIRD, Administrator, etc., Appellant, v. J. D. MONROE et al., Defendants; GEORGE HARLAN, Respondent.

LOS ANGELES CHARTER—OPENING OF STREET UNDER GENERAL LAW—VOID PROCEEDINGS AND DEED.—Proceedings to open and widen a street in the city of Los Angeles under the general law of March 6, 1889, instead of under the city charter, are void, and a deed thereunder executed by the superintendent of streets is a nullity.

**TAXATION—DEED TO STATE—PERIOD OF REDEMPTION NOT RECITED—IN-
VALIDITY—CURATIVE ACT.**—Under the law as it stood prior to the
curative act of 1903 a deed to the state for delinquent taxes not
containing a recital of the time allowed for redemption was void;
but that curative act had the effect to legalize deeds theretofore
made not containing such recital, provided five years have elapsed
since the date of the sale and deed.

ID.—CONSTRUCTION OF CURATIVE ACT—RETROACTIVE EFFECT.—The rule
that a statute should not be construed to operate retroactively unless
the legislative intention that it should so operate is clearly apparent
cannot apply where it is essentially a curative act, intended to give
effect to past transactions which are ineffective because of neglect
to comply with some requirement of law.

ID.—CONSTITUTIONALITY OF ACT.—The curative act of February 28, 1903,
is not a "local or special law" within the prohibition of subdivisions
14 or 18 of section 25 of article IV of the constitution, being a
general law, applicable to all certificates and deeds having the defects
stated. Nor does it operate to deprive the property-owner of his
property "without due process of law," since it is his failure to
redeem within the time fixed by law, after "due process of law"
to enforce delinquent taxes, that deprives him of his property, the
defect cured being in a merely formal matter, not affecting the sub-
stantial rights of the taxpayer.

ID.—CERTAINTY AS TO AMOUNT OF SALE.—A recital as to the amount
for which the property was sold which shows the total amount due
for taxes, penalties, costs, and charges at the time of the sale, is
sufficiently certain.

**ID.—DESCRIPTION OF PROPERTY ASSESSED—USE OF ABBREVIATIONS—
REFERENCE TO TRACT NAMED—PRESUMPTION—KNOWN EXTENT OF
BOUNDARIES.**—The description of property assessed as being "in Los
Angeles County," in "Pellissier Tr.," and as "Lot 5" in "Block
K," sufficiently shows that the property assessed is Lot 5 in Block
K in the Pellissier Tract in Los Angeles County. The use of abbrevi-
ations is permissible if thereby the property may be easily known;
and the court might presume in the absence of proof to the con-
trary that there was but one such tract in the county, and that the
tract and the extent of its boundaries are well known by that name.

**ID.—STIPULATION AS TO RECORDED MAP—PROPERTY SUFFICIENTLY IDEN-
TIFIED.**—Where there was a stipulation as to a recorded map of the
"Pellissier Tract" designating with certainty the property referred
to in the assessment, it is to be taken as meaning that there is but
one such map, and the property is sufficiently identified by means
thereof. It was permissible to show, in aid of the description,
that it was in fact sufficient to identify the land, and to show the
recorded map of that tract for that purpose.

ID.—DESCRIPTION OF CITY LOTS—ALTERNATIVE DESCRIPTION.—It is not
essential to the validity of an assessment of a city lot that the
description of the lot complies with the requirements of subdivision

3 of section 3650 of the Political Code. The assessor is authorized to assess the same under subdivision 2, if he so desires, using any description which is sufficient to identify the property assessed.

Id.—DESIGNATION OF SCHOOL AND ROAD DISTRICT.—Where the name of the school and road district were the same and were known by the name of "Rosedale," it was sufficient to place the name partly in one column and partly in the other, thus: "Ros | edale."

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

O. B. Carter, for Appellant.

W. W. Allen, Sr., Lucius M. Fall, and E. R. Fox, as *Amicus Curia*, for Respondent.

ANGELLOTTI, J.—This is an action to quiet title to certain real property, described in the complaint as lot five in block "K" of the Pellissier tract in the city and county of Los Angeles, state of California, as per map recorded in book 15, page 70, miscellaneous records of said county. Defendant Harlan had judgment, and plaintiff appeals from such judgment and from an order denying his motion for a new trial.

Plaintiff's testator was the owner of the land involved at the time of his death, January 7, 1899, and his estate is still the owner thereof unless title has been divested by either of two deeds. The first of these is a tax-deed from the tax-collector of Los Angeles County to the state of California of date July 6, 1900, for state and county taxes for the year 1894, followed by a deed from the tax-collector, dated July 20, 1901, purporting to have been made upon the authorization of the state controller, to one Monroe, whose title is vested in defendant Harlan. The second deed is a deed dated July 24, 1903, from the street superintendent of the city of Los Angeles to defendant Harlan, based on an assessment for the opening and widening of Pico Street in said city.

It appears that the street superintendent's deed was made in proceedings for the opening and widening of Pico Street, under and in accord with the general law of March 6, 1889, (Stats. 1889, p. 70,) instead of under and in accord with the

provisions of the charter of the city of Los Angeles applicable to such matter. Such proceedings were therefore void (*Byrne v. Drain*, 127 Cal. 663, [60 Pac. 433]), and the street superintendent's deed a nullity. This does not appear to be contested by defendant.

The question then is as to the validity of the tax-deed.

1. The sale to the state was made July 3, 1895, under the provisions of section 3771 of the Political Code, as amended March 28, 1895, (Stats. 1895, p. 327,) requiring the sale to the state by the tax-collector of all property delinquent for taxes. The deed to the state was made July 6, 1900, under section 3785 of the Political Code, as amended March 28, 1895, (Stats. 1895, p. 328). That section provided: "If the property is not redeemed within the time allowed by law for its redemption, the tax-collector, or his successor in office, must make the state a deed of the property, reciting in such deed the name of the person assessed (when known), the date of sale, a description of the land sold, the amount for which it was sold, that it was sold for delinquent taxes, giving the assessed value and the year of assessment, the time when the right of redemption had expired, and that no person has redeemed the property in the time allowed by law for its redemption." Section 3780 of the Political Code provided that a redemption might be made "within five years from the date of the sale to the state, or at any time prior to the entry or sale of said land by the state." The tax-collector's deed to the state did not recite in terms "the time when the right of redemption had expired," but did recite "the date of sale," and further: "And whereas no person has redeemed the property aforesaid within the time allowed by law for its redemption; . . . and whereas, the time for redeeming said property has expired, and the same has not been redeemed, nor any part thereof." The recital as to what the certificate of sale stated as to when the purchaser would be entitled to a deed, we regard as immaterial in this connection. As we have seen, section 3785 of the Political Code requires in the deed not only a recital of "the date of sale," and a recital that "no person has redeemed the property in the time allowed by law," but also a recital of "the time when the right of redemption had expired," and the first two recitals thus required cannot be taken as also answering the requirement as to the additional recital

expressly provided for. The statute undoubtedly requires a plain statement in terms as to the time when the right of redemption had expired, and a deed that did not contain it was not in compliance with the statute.

There can be no doubt that it was the well-settled doctrine in this state prior to the amendment of our tax-laws providing that all property delinquent for taxes shall be declared sold to the state for the taxes and penalties due, instead of to the best bidder at public auction, that a tax-deed not containing any recital required by law was void. (See *Grimm v. O'Connell*, 54 Cal. 522; *Hubbell v. Campbell*, 56 Cal. 527; *Anderson v. Hancock*, 64 Cal. 455, [2 Pac. 31]; *Hughes v. Cannedy*, 92 Cal. 382, [28 Pac. 573]; *Simmons v. McCarthy*, 118 Cal. 622, [50 Pac. 761].) The decisions proceed upon the theory that it is competent for the legislature to prescribe the form of instrument which, as the result of a proceeding *in invitum*, can alone divest the citizen of his title, and that where the particular form of the tax-deed has been prescribed by statute the form becomes substance, and must be strictly pursued, and it is not for the courts to inquire whether the required recitals are of material facts or otherwise. (*Grimm v. O'Connell*, 54 Cal. 522; *Simmons v. McCarthy*, 118 Cal. 622, [50 Pac. 761].) This may appear to be an extremely technical ruling when applied in the case of such a recital as that here involved. We are unable to see how a recital in the deed to the state as to the date when the right of redemption had expired could be of any substantial benefit to the property-owner, especially where there is a recital as to the date of sale, which, when considered in connection with the law as to the time after a sale when the state will be entitled to a deed, is sufficient to enable any one to determine exactly when the time had expired. The legislature has seen fit, however, to require that the time shall be expressly stated in the deed, and that nothing in that regard shall be left to be determined from one's knowledge of the law. If the decisions already cited as to the effect of a failure to include in the tax-deed all the recitals required by statute, however immaterial an omitted recital may appear to us, are to be followed, it must be held that the tax-deed in question was originally void.

By act approved February 28, 1903, taking effect immediately, entitled "An act to confirm, validate, and legalize cer-

tificates of tax-sales and tax-deeds executed to the state of California for property sold and deeded thereto for non-payment of taxes" (Stats. 1903, p. 63), it was provided as follows: "That all certificates of tax-sales and tax-deeds made to this state by the county tax-collector, which certificates and deeds are based upon the sale of property for non-payment of taxes, and which certificates and deeds fail to recite the correct date, or any date, when the right of redemption will expire, or had expired, or which certificates recite an incorrect date when the state would be entitled to a deed, be and they are hereby confirmed, validated, and legalized, and the same shall be construed and operate at all times and upon all occasions in law in the same manner as if such matters and things required by law had been recited therein and performed in the first instance; provided, that in all cases five years shall have elapsed between the date of sale of the property to the state for non-payment of taxes and the date of the execution of such deed." It is claimed by defendant that the defect in the deed was cured by this act, and we are of the opinion that it should be so held.

We are fully aware of the rule that a statute should not be construed to operate retroactively, unless the legislative intention that it shall so operate is clearly apparent. (*San Francisco Sav. Union v. Reclamation District*, 144 Cal. 639, 647, [76 Pac. 374], and cases there cited. See, also, *State v. Harman*, 57 W. Va. 447, [50 S. E. 828].) It is impossible to read carefully the statute in question, however, without coming to the conclusion that it was intended to so operate. It is essentially a curative act, intended to give effect to past acts or transactions which are ineffective because of neglect to comply with some requirement of law. No other object for its enactment can reasonably be suggested. If it had been simply intended to dispense with the necessity in future cases of the requirement that the certificate and deed should correctly recite the date when the right of redemption would expire or had expired, the obvious and simple method would have been to amend in those particulars the statute with reference to certificates and deeds, or to simply provide that the omission to correctly recite such date would not invalidate the certificate or deed. Retaining those provisions in their original form, the legislature, however, enacted this statute, which in every line

compels the conclusion that it was the intention to cure, "to confirm, validate, and legalize," something already ineffectively done. The words used are capable of no other reasonable construction, however strictly we construe them.

The statute by its terms covers the case before us. At the date of the approval of the act, the deed had been executed to the state, and the defect therein was that it failed to recite any date when the right of redemption had expired. The only question remaining in this connection is as to the power of the legislature to cure such a defect in the manner here attempted. The act of February 28, 1903, is not a "local or special" law within the meaning of those words as used in section 25 of article IV of our constitution, and is therefore not within the 14th or 18th subdivisions of that section, whereby the legislature is prohibited from passing local or special laws giving effect to invalid deeds, wills, or ~~other~~ instruments, or legalizing, except as against the state, the unauthorized or invalid act of any officer. It applies to all certificates and deeds having the defects stated, and the certificates and deeds constituted a class characterized by such qualities as indicated the propriety of such legislation. (*Deyoe v. Superior Court*, 140 Cal. 476, 481, [98 Am. St. Rep. 73, 74 Pac. 28].) The only remaining objection to the act is that it operates to deprive the property-owner of his property without due process of law. This objection, we are satisfied, is not well founded. Assuming in the discussion of this question, as we must, that the assessment upon which the deed was founded was valid, and that all the requirements of the law relative to the enforcement of the taxes thereunder up to the time of the execution of the deed had been fully complied with, the omission of the tax-collector to insert in the deed the recital in question, though sufficient perhaps under our decisions to render the deed ineffectual as it then stood, was really more in the nature of a mere irregularity, not affecting any substantial right of the property-owner. Under the law requiring that all property delinquent "shall by operation of law and the declaration of the tax-collector be sold to the state" (Pol. Code, sec. 3771), the property, more than five years before the deed, had been sold to the state for the taxes, penalties, and costs due thereon. At the time of the execution of the deed, the five years from the date of sale within which the

owner had the absolute right of redemption having expired (Pol. Code, sec. 3780), the state was entitled to the deed from the tax-collector, and it was then the duty of the tax-collector to execute such deed in the manner prescribed by law. The state was then equitably the owner of the property. The property-owner had, as against the state, forfeited all rights in the property, except the privilege accorded him by the statute of redeeming it at any time before the state actually entered or disposed of it. The deed to the state provided for by the statute, though designated a "deed," is nothing more in effect than formal written evidence of the various facts essential to vest the property in the state, and to which the legislature has seen fit to give a certain effect. (Pol. Code, sec. 3787.) It is the evidence, primary in some particulars and conclusive in others, of those facts from which the vesting of the title to the property in the state necessarily follows as a matter of law, and *prima facie* operates as a muniment of title. (Pol. Code, secs. 3786, 3787.) We cannot see how any right of the property-owner is violated by a statute validating such of these instruments as are ineffectual solely because they fail to contain a recital as to the date when the absolute right of redemption had expired and the state had become entitled to a deed. The fact that the five years' period had expired without redemption was the important thing, so far as he was concerned, and the curative statute probably could not, and certainly did not, purport to apply to any case where such period had not elapsed between the date of sale and the date of the execution of the deed. It is his failure to redeem within the time specified that deprives him of his property, after due process of law, and he has no constitutional right to any particular form of instrument by which his failure to redeem and the consequent final vesting of the property in the state shall be evidenced. The defect attempted to be cured by the act is as to a mere formal matter,—one that in no degree affected any of the substantial rights of the taxpayer. It was therefore entirely within the power of the state to remedy the defect by curative statute. It appears to be thoroughly well settled that in matters pertaining to the collection of taxes it is within the power of the legislature to cure, by retroactive statutes, defects which are in their nature irregularities only, which do not extend to matters

of jurisdiction, and that such statutes are not within the constitutional inhibition against the taking of property without due process of law. We consider it unnecessary in this connection to do more than refer to the opinion of this court in the recent case of *Chase v. Trout*, 146 Cal. 350, [80 Pac. 81], where the matter is exhaustively discussed, and many authorities cited. That case, it is true, involved simply a conclusive-evidence provision in an act operating prospectively only, but the doctrine therein declared is equally applicable to mere validating acts, and many of the cases cited involved questions as to the validity of such acts. The case of *Harper v. Rowe*, 53 Cal. 233, relied on by plaintiff, is not in conflict with the views expressed in *Chase v. Trout*, 146 Cal. 350, [80 Pac. 81]. There the levy of the tax was invalid for want of any law authorizing it to be levied, and the curative act, enacted after a purported sale for delinquent taxes thereon, attempted to validate the levy and all proceedings had thereon, including the sale for delinquent taxes. This was clearly a matter going to the jurisdiction. Without a valid tax levy there could be no valid proceedings for the enforcement of the tax, and it was very properly held in *Harper v. Rowe*, 53 Cal. 233, that a statute purporting to validate such a levy, and the sales already made thereunder, operated to deprive property-owners of their property without due process of law, and by mere legislative rescript.

2. It is further claimed that the deed was invalid for failure to recite "the amount for which it [the land] was sold" to the state. The objection in this behalf is most technical and wholly without merit. The recital is "was, by operation of law and the declaration of said tax-collector, sold to the state of California, as purchaser, in pursuance of law in such cases made and provided, to pay said taxes of every kind charged against said property, together with the penalties, costs, and charges due thereon, to wit: the sum of two and 92-100 dollars." Plaintiff contends that this recital does not show the amount for which the property was sold to the state, but shows only the object of the sale, and the total amount due for taxes, penalties, costs, and charges. As, under the law, there could be a sale to the state only for the precise amount so due, it appears very clear that what the legislature intended as to this particular recital was simply

that there should be a statement as to the exact amount so due to the state at the time of sale. In *Simmons v. McCarthy*, 118 Cal. 622, [50 Pac. 761], relied on by plaintiff, the recitals left it in doubt as to the exact amount paid by a purchaser at a tax-sale. There is no such uncertainty in the deed here involved.

3. The assessment is assailed upon several grounds. The assessment was introduced in evidence. The description of property therein was as follows: "In Los Angeles County, in Pellissier Tr.," and in the column headed "City and Town Lots," under the subheading "Lot," the figure "5," and under the sub-heading "Block" the letter "K." No city or town was named, and it does not appear whether or not at the time of the assessment the property was included in any city or town. It was stipulated that a map of the Pellissier tract was recorded in the year 1887 in the recorder's office of Los Angeles County, and that it showed said lot 5 in block K to be fifty-four feet front by one hundred and twenty-one feet deep. The valuation of the property was placed in the column headed "Value of City and Town Lots." In the assessment the word "Rosedale" was written across the line dividing the column headed "School District" from the column headed "Road District," thus:—

" School District Ros	Road District edale "
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The principal contention against this assessment is that the description of property is insufficient. It is apparent from the face of the assessment that the property assessed is lot 5 in block K in the Pellissier tract in Los Angeles County. Although we are not prepared to commend the abbreviation of the word "tract" to "Tr.," we think that such abbreviation used in the connection in which it here appears could not be reasonably supposed to indicate, as suggested by plaintiff, either "trustee," "transcript," or "treasurer," or anything else than the word "tract." The use of abbreviations in assessments appears to be permissible, if thereby the property "may easily be known." (*Rollins v. Woodman*, 117 Cal. 516, 519, [49 Pac. 455].) Except, therefore, for the reference to the map, we have in the assessment the same description as that contained in plaintiff's complaint.

A substantially similar description—viz. "Lots in Leibrandt Tract, Blk F, Nos. 13, 14, 15, 16, 17 and 18"—was held insufficient in *Miller v. Williams*, 135 Cal. 183, [67 Pac. 788], but in that case there was no evidence introduced to show that the description in the assessment was sufficient to identify the property. Here we have the stipulation as to the map of the Pellissier tract recorded in the office of the county recorder, showing this lot, which stipulation must be taken as meaning that there was only one such map, and that this map showed but one lot 5 in block K in said tract. It may be conceded that the description was not in compliance with subdivision 3 of section 3650 of the Political Code, providing for the listing of city and town lots as follows: "City and town lots, naming the city or town, and the number of the lot and block, according to the system of numbering in such city or town, and the improvements thereon." (*Miller v. Williams*, 135 Cal. 183, [67 Pac. 788].) But it is not essential that property situated in a city or town, even though it be a city or town lot, should be listed in accordance with this provision. By subdivision 2 of the same section it is provided that land must be listed "by township, range, section, or fractional section; and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it," and any land, wherever situated, may be listed under this provision. The object of subdivision 3 of section 3650 was to obviate the necessity of describing each lot by metes and bounds or other description sufficient to identify it, and to render an assessment made in accord therewith equivalent to an assessment under subdivision 2, but the assessing officer is still at liberty to assess under subdivision 2 if he so desires. (See *Davis v. Pacific Imp. Co.*, 137 Cal. 245, 247, [70 Pac. 15].)

The question, then, is as to whether the description here given was "sufficient to identify" the land. It may be assumed that it was of such a nature as to indicate that it could only be exactly located by reference to some map or plat, and that as it referred to no such map or plat it did not *prima facie* sufficiently identify the land (*Miller v. Williams*, 135 Cal. 183, [67 Pac. 788]), as would a description by name, such as "Forks House Ranch," or a description such as "house and lot on the north side of Main Street, Michigan

Bluffs, occupied by A. Ferguson as a tinshop." (See *People v. Leet*, 23 Cal. 161.) In the case just cited it was substantially said that a description of a tract of land by name is *prima facie* sufficient in an assessment, as it is presumed that the tract and the extent of its boundaries is well known by the name.

It was, however, permissible to show, in aid of this description, that it was in fact sufficient to identify the land, and, in this behalf, to show the recorded map of such Pellissier tract, designating with certainty the property referred to in the assessment. If by such evidence it was made to appear that there was such a recorded map, and only one such map, or, if more than one, no difference therein so far as the assessed property was concerned, the evidence was sufficient to sustain a conclusion that the assessment sufficiently identified the property. The trial court had the right to assume, in the absence of a showing to the contrary by the person assailing the description, that there was but one Pellissier tract in the county of Los Angeles, and that this tract and the extent of its boundaries were well known by that name. (*People v. Leet*, 23 Cal. 161.)

The rules which should be applied in determining the question as to the sufficiency of a description in an assessment are most elaborately and clearly stated in the opinion in *Best v. Wohlford*, 144 Cal. 733, [78 Pac. 293], the most recent expression of this court upon the subject. It is true that such case involved a question as to the sufficiency of the description of lands outside of a city or town, made under a provision similar to subdivision 2 of section 3650 of the Political Code, but there is no material difference between that case and this, so far as the question under discussion is concerned. The question there was, as here, as to the sufficiency of the assessment description to identify the property. The description there was in an irrigation district assessment, and, so far as material to the question we are discussing, was, "Lot four (4) block one hundred seventy-eight (178) 14.42 acres, Rancho Rincon del Diablo," which rancho was shown to constitute the whole irrigation district. No map of said rancho was referred to in the assessment or collector's deed. The judgment against the claimants under the tax-deed was reversed because the trial court had refused to allow proof

that there was at the time of the assessment but one lot 4 in block 178 in said rancho, and that such fact was then well known, the claimants having sought to introduce in evidence in this behalf the map or plat of said rancho on file in the office of the county recorder. The effect of the opinion in that case is that the real and only essential, so far as the description is concerned, is that it should be sufficient in itself to definitely inform the property-owner as to the exact property assessed. This much, of course, has always been considered essential, the owner being entitled to know with certainty what land is charged with the tax. This knowledge being afforded, the whole purpose of the description under the present revenue law, whereby all property delinquent for taxes is declared sold to the state for taxes, penalties, and costs, is subserved. It was expressly recognized in *Miller v. Williams*, 135 Cal. 183, [67 Pac. 788], that much of the reasoning in support of the conclusion as to the insufficiency of the description would have no application under the new system. Under this system the possible purchaser who would pay the tax for the smallest portion of the land is eliminated, and the property-owner has no longer any ground upon which to urge that his rights may have been injuriously affected by reason of the fact that the description does not on its face at once certainly identify the property to all possible purchasers, and for this reason does not bring the return at the sale that it otherwise would.

It is said in *Best v. Wohlford*, 144 Cal. 733, [78 Pac. 293], that the provision in the law that the description must be "sufficient to identify" the property implies that evidence may be received, not for the purpose of helping out a defective description, or to show the intention with which it was made, or to resolve an ambiguity in its terms,—none of which things can be done,—but to show the sufficiency of the description and apply the description given to the surface of the earth; and further, that the question as to whether the description is sufficient to identify the land is a question of fact to be determined from the evidence presented upon that issue. The court further said: "The designation of a tract of land as a portion of a larger tract by number and block, without any reference to a map, may be sufficient to identify it, and if so the omission to refer to a map is not fatal to the description.

If reference is made to a map, the map thereby becomes a part of the description; and may be read in evidence to identify the land, by showing that it is delineated thereon according to the recital; and although it is not competent to show that any particular map was intended, if none is referred to, yet if it can be shown that there is only one map of a tract which includes the lot in controversy, upon which this lot is delineated or designated, and that that map is well known and generally accepted as authentic, it may be received in evidence as tending to identify the land before the court." While general expressions are to be found in some of the opinions of this court as to what is required to appear on the face of the assessment that tend to support plaintiff's contention, there is no decision in conflict with the views expressed in *Best v. Wohlford*, 144 Cal. 733, [78 Pac. 293]. In *Miller v. Williams*, 135 Cal. 183, [67 Pac. 788], the most favorable case to him, there was no attempt in the trial court to show the sufficiency of the description to identify the property, and the question as to the right to show this in aid of the assessment was not discussed. As to the cases cited in *Miller v. Williams*, in support of the statement that failure to refer to a map of a tract in an assessment has been held fatal, *Labs v. Cooper*, 107 Cal. 656, [40 Pac. 1042], involved a street assessment simply of "all, lot 6, block D & E—16 and 17," and there was absolutely nothing to indicate of what larger tract or property these lots and blocks constituted subdivisions. *Cadwallader v. Nash*, 73 Cal. 43, [14 Pac. 385], was a case of a deed describing land by reference to a map, where there were two maps, and the description given rendered it uncertain as to which map was referred to. *Keane v. Canovan*, 21 Cal. 291, [82 Am. Dec. 738], was a case where by reason of failure to state a direction it was impossible to locate the lot, and *People v. Mahoney*, 55 Cal. 286, was a case where the description was so indefinite upon its face that the taxpayer could not know therefrom the precise property charged against him. None of these cases are applicable here. The description given must always of course be sufficient to apprise the owner as to the exact property assessed to him, but when the description is such that, in the light of the knowledge which it must be presumed is possessed by property-owners of the community in which the property is situated, it accomplishes

this result, it is sufficient for all assessment purposes, although evidence may be necessary to apply the description to the surface of the earth, and evidence is always admissible to show this in support of the description, just as it is admissible to show against a description apparently clear and certain on its face, that, by reason of other circumstances, it is uncertain or doubtful in its application. This is substantially the doctrine of *Best v. Wohlford*, 144 Cal. 733, [78 Pac. 293], and it is fully supported by the reasoning of the opinion and by the numerous authorities cited therein. It being made to appear to the satisfaction of the trial court that there was but one map of the Pellissier tract, which map was a public record, and that this map showed but one lot 5, block K, in such tract, there was enough, in the absence of other evidence tending to impeach the effect of this, to justify the conclusion of the trial court that the description in the assessment was sufficient to show with absolute certainty to the owner the exact property assessed to him, and that the same, therefore, complied with the requirements of subdivision 2 of section 3650 of the Political Code.

The other objections to the assessment require very little notice. It is urged that the name of the city or town wherein the property is situated is not stated, as required by subdivision 3 of section 3650 of the Political Code, although the lot is assessed and valued under the head of "city and town lots." But the naming of the city or town is absolutely essential to the validity of the assessment only when the special mode of assessment prescribed by that subdivision is followed—viz. where only the number of the lot and block, according to the system of numbering in the city or town, is given. While the name of the city or town might advantageously be given in assessments under subdivision 2 of section 3650, it is not essential if the description otherwise sufficiently identifies the property sought to be charged. It is also claimed that the assessment does not show in separate columns "the school, road, and other revenue districts in which each piece of property assessed is situated," as required by subdivision 13 of section 3650 of the Political Code. We have already stated the facts in this regard, and they, in our judgment, show a substantial compliance with this provision, indicating "Rosedale" as the name of both road and school district. In *Knott v.*

Peden, 84 Cal. 299, [24 Pac. 160], evidence introduced showed the assessed property to be in a certain road district (which is not the case here, there having been no showing in this behalf), and there was no entry at all in the road district column. There is nothing in the record to show that any portion of the tax against this property was for road-district purposes. The only recital in the deed to the state in this regard was "for county purposes, the sum of \$1.77-100; for state purposes, the sum of \$39-100."

It is practically admitted that if the title of plaintiff's intestate passed to the state by virtue of the tax proceedings, defendant Harlan has regularly succeeded thereto. We are satisfied that such must be held to be the effect of those proceedings, and that the conclusion of the trial court was correct.

The judgment and order are affirmed.

Shaw, J., McFarland, J., Henshaw, J., Lorigan, J., Sloss, J., and Beatty, C. J., concurred.

Rehearing denied.

[L. A. No. 1683. In Bank.—February 21, 1907.]

H. M. CROSSMAN, Appellant, v. VIVIENDA WATER COMPANY, Defendant; STOCKHOLDERS, Respondents.

CORPORATIONS—VOLUNTARY DISSOLUTION—FALSE STATEMENT AS TO INDEBTEDNESS — JURISDICTION TO DECREE DISSOLUTION.—Where the proceedings for the voluntary dissolution of a corporation were in full accord with the provisions of sections 1227-1233 of the Code of Civil Procedure relating thereto, an alleged false statement in the application that all claims and demands against the corporation had been satisfied and discharged is not a matter going to the jurisdiction of the court to decree the dissolution; but the question as to the truth of this allegation was, so far as the dissolution proceeding was concerned, one solely for the determination of the court to which the application was made, and which found it to be true.

ID.—FRAUD UPON COURT—COLLATERAL ATTACK—ACTION BY CREDITOR AGAINST DISSOLVED CORPORATION.—If it be assumed that the allegation was false in fact, and was a fraud upon the court, the decree

of dissolution cannot be collaterally attacked on that ground in an action by a creditor to enforce its claim in a suit against the dissolved corporation, in which it is not sought directly to set aside the decree on the ground of fraud.

ID.—CONSTITUTIONALITY OF PROCEEDINGS FOR DISSOLUTION.—The code provisions in the matter of the voluntary dissolution of corporations are not unconstitutional on the ground that the only notice required is by publication, and that the opportunity of creditors to recover is thereby restricted, and the obligation of contracts thereby impaired. The debts of the corporation are not vacated by its dissolution. In the absence of statute, equity treats the surviving assets as a trust fund for creditors and stockholders; and the obligation of contracts survives the dissolution of the corporation as effectually as in the case of the death of a private person.

ID.—ADMINISTRATION OF ASSETS AFTER DISSOLUTION.—The provision for the administration of assets of a dissolved corporation in this state is regulated by section 400 of the Civil Code, providing that "Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation." This provision is applicable in all cases of dissolution, whether voluntary or involuntary.

ID.—EFFECT OF DISSOLUTION UPON ACTION AGAINST DISSOLVED CORPORATION—VOID JUDGMENT.—There being no statute in this state to the contrary, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body or in its corporate name. There is no one who can appear and act for it; and all actions against it are abated, and any judgment attempted to be given against it is void, as much so as if it had been rendered against a dead natural person.

ID.—REMEDY AFTER DISSOLUTION.—The remedy of a creditor after the dissolution of a corporation in this state is against the directors who continue such at the time of its dissolution and the stockholders.

ID.—VOID JUDGMENT COLLATERALLY IMPEACHABLE.—A void judgment against a dissolved corporation may be collaterally impeached, and its invalidity shown by any one interested either as creditor or stockholder to participate in its assets, or a stockholder liable for its debts. In the absence of circumstances operating as an estoppel upon them to assert such invalidity they should be allowed so to do for their own protection.

ID.—MOTION BY STOCKHOLDERS TO VACATE VOID JUDGMENT.—Stockholders, not estopped from doing so, may appear in the action in which a void judgment was rendered against a dissolved corporation at suit of a creditor commenced after its dissolution, to move to vacate such void judgment, and where such motion was made within six months after the entry of the judgment it was not too late, assum-

ing that the provision of section 473 of the Code of Civil Procedure is applicable to a case of this character.

APPEAL from an order of the Superior Court of San Bernardino County granting a motion of the stockholders of the Vivienda Water Company to set aside a judgment against it in favor of appellant. Frank F. Oster, Judge.

The facts are stated in the opinion of the court.

Ezra Crossman, and Works, Lee & Works, for Appellant.

Flint & Barker, and Shirley C. Ward, for Respondents.

ANGELLOTTI, J.—This action was commenced in the year 1894 against the defendant, alleged to be a corporation, for an accounting and the recovery thereon of some \$33,250, and also against certain persons alleged to be stockholders therein, to recover from them their proportionate shares of the amount sought from the corporation. Summons was served on respondent J. F. Holbrook, as president of the corporation, and he acknowledged service as president. What purported to be a demurrer on the part of the corporation and certain other defendants was served and filed on August 27, 1894, by an attorney assuming to act for such parties. This demurrer was overruled, and on February 1, 1895, an answer was filed by all of said stockholder defendants, in which, besides denying the facts alleged in the complaint as to liability on the part of the alleged corporation, said defendants denied the existence of the corporation since December 27, 1893, alleging that on the last-mentioned day, by a proceeding under title VI of part III of the Code of Civil Procedure (secs. 1227-1233), relating to the voluntary dissolution of corporations, said corporation was by the superior court of Los Angeles County duly declared to be dissolved, and had not since existed as a corporation. No answer was made for the corporation. On December 2, 1896, the entry of the default of the corporation was made under direction of plaintiff, and on December 4, 1896, judgment thereon was entered by the clerk against the corporation for the full amount claimed, with interest. A motion to set aside this judgment against the corporation was made by the defendant stockholders on various grounds.

and this motion was granted by the superior court on December 11, 1899. An appeal was taken by plaintiff to this court from the order granting such motion, and on June 16, 1902, that order was affirmed. The only ground of the motion considered here was that the clerk had no power to enter the judgment in the absence of an order of the court, and it was held that this claim was well based, the action being primarily for an accounting. (*Crossman v. Vivienda Water Co.*, 136 Cal. 571, [69 Pac. 220].) On December 23, 1899, plaintiff dismissed the action as to all of the defendants except the alleged corporation. On December 22, 1902, an order was made in the lower court appointing a referee to take an accounting between plaintiff and the corporation, and this referee presented his report to the court, and on November 3, 1903, judgment was given by the court in favor of the plaintiff against such alleged corporation for \$28,221.25 and costs. All of these proceedings were had without the participation of any one purporting to represent the corporation, and without any notice to any one. Respondents here, the original stockholders defendant herein, had no knowledge of any of these proceedings until they were served with a supplemental complaint in another action pending against them as stockholders, which complaint alleged the recovery of this judgment against the corporation, and the inability of plaintiff to discover property of the corporation from which the same could be satisfied. Respondents thereupon gave notice of a motion to be made February 8, 1904, to set aside the judgment upon the ground, among others, that the court had no jurisdiction to give the same, for the reason that, prior to the institution of the suit, the corporation had been dissolved and had ceased to exist. They also moved that the default and order appointing a referee be set aside for the same reason. On March 30, 1904, the court made an order setting aside and vacating the judgment upon this ground, and the appeal before us is one taken by plaintiff from this order.

The record shows that the corporation was dissolved and had ceased to exist several months before the commencement of the action. The proceedings for dissolution were in full accord with the provisions of our law relative to voluntary dissolution of corporations (Code Civ. Proc., secs. 1227-1233). It is suggested that the court making the decree of dissolution

was without jurisdiction of the proceedings because of an alleged false statement in the application for dissolution to the effect that all claims and demands against the corporation had been satisfied and discharged. This is not a matter going to the jurisdiction. The question as to the truth of this allegation was, so far as the dissolution proceeding was concerned, one solely for the determination of the court to which the application was made, and that court found that the allegation was true. (Code Civ. Proc., secs. 1228, 1232.) Even if we assume here that the allegation was false in fact, the jurisdiction of the court in the dissolution proceeding would in no degree be affected. In reply to what is said by appellant as to a fraud being committed upon the court in that matter, it is sufficient to say that this is not an action to set aside the decree of dissolution on the ground of fraud, and that such decree is not collaterally assailable upon that ground.

The decree of dissolution sufficiently shows legal notice of the hearing of the application to have been given.

There is nothing in the point made to the effect that our code sections, in the matter of voluntary dissolution of corporations, are unconstitutional, in that the only notice required is by publication, and the opportunity of creditors to recover is thereby restricted and the obligation of contracts is therefore impaired. We see no reason to doubt the legal sufficiency of the provisions as to notice. It is well settled that statutory provisions for the voluntary dissolution of corporations are not violative of the constitutional inhibition against the impairment of the obligation of contracts. The universally accepted modern doctrine is that the debts of a corporation are not vacated by its dissolution. In the absence of statute, equity treats the surviving assets as a trust fund for the creditors and stockholders, and enables the beneficiaries to reach the same by appropriate procedure. In *Mumma v. Potomac Co.*, 8 Pet. 281, it was said by the supreme court of the United States: "We are of opinion that the dissolution of the corporation, under the acts of Virginia and Maryland, . . . cannot, in any just sense, be considered, within the clause of the constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those states, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation

of those contracts survives, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws." The matter is now generally covered by statute. Where there is no statute providing for the continuance of the corporation itself for the purpose of settling its affairs, provision is generally made for the doing of this by others. We have such a provision in this state. Section 400 of the Civil Code provides: "Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation." This provision is applicable in all cases of dissolution, whether voluntary or involuntary. (*Havemeyer v. Superior Court*, 84 Cal. 327, 365, [18 Am. St. Rep. 192, 24 Pac. 121]; *State I. and I. Co. v. Superior Court*, 101 Cal. 135, 148, [35 Pac. 549].)

It is settled beyond question that, except as otherwise provided by statute, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body or in its corporate name. It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void. As to this, all the text-writers agree, and their statement is supported by an overwhelming weight of authority. (See 5 Thompson on Corporations, secs. 6721, 6722, 6723; Clark & Marshall on Private Corporations, secs. 322, 329; Angell & Ames on Corporations, sec. 195; 2 Morawetz on Corporations, sec. 1031; 10 Cyc., p. 1316; 7 Am. & Eng. Ency. of Law, p. 854; *Pendleton v. Russell*, 144 U. S. 640, [12 Sup. Ct. 743]; *First National Bank v. Colby*, 21 Wall. 609; *Mumma v. Potomac Co.*, 8 Pet. 281; *Sturges v. Vanderbilt*, 73 N. Y. 384; *Rodgers v. Adriatic etc. Co.*, 148 N. Y. 38, [42 N. E. 515].) There is no statute of this state that authorizes the commencement or continuance of an action against the corporation after its legal

death. We have no statute similar to that of several states, providing that in the event of the dissolution of a corporation its existence shall be continued either indefinitely or for a specified time for the settlement of its affairs. Statutes similar to our section 400 of the Civil Code above quoted do not have the effect of continuing the existence of the corporation as *cestui que trust*, or otherwise, so as to render it capable of defending actions in its corporate name. (Thompson on Corporations, sec. 6739; Clark & Marshall on Private Corporations, sec. 333; *Sturges v. Vanderbilt*, 73 N. Y. 384.) If section 385 of the Code of Civil Procedure, providing that an action does not abate by the death or any disability of a party, if the cause of action survives, is applicable to the case of a corporation, it does not authorize the continuance of the action against the corporation itself, but allows the action to be continued only against the "representative or successor in interest," brought in on motion. (*McCulloch v. Norwood*, 58 N. Y. 562, 568. See, also, *Judson v. Love*, 35 Cal. 463.) There being no statute which can be held to modify the general rule, it would seem that the judgment in this case was as much of a nullity as if it had been given against a dead natural person, and that plaintiff's remedy, after the dissolution of this corporation, was against the directors who continued such at the time of dissolution as trustees and the stockholders. (*Sturges v. Vanderbilt*, 73 N. Y. 384.)

There can be no serious doubt that such a void judgment can be collaterally impeached and its invalidity shown by any one interested, such as one entitled either as creditor or stockholder to participate in the assets of the corporation, or a stockholder liable for the debts of the corporation. In the absence of circumstances operating as an estoppel upon them to assert such invalidity, they should be allowed to so do for their own protection. In *Sturges v. Vanderbilt*, 73 N. Y. 384, a judgment given against a corporation which had been dissolved pending the action was held void in an action brought to compel stockholders of the company to apply certain moneys received by them from the assets of the company to the payment of such judgment. In *McCulloch v. Norwood*, 58 N. Y. 562, 568, the receiver of a defunct corporation was allowed to show such invalidity of the judgment rendered

against the corporation after its dissolution, in a proceeding brought to subject assets in his hands to the satisfaction thereof. The same is true of *Pendleton v. Russell*, 144 U. S. 640, [12 Sup. Ct. 743]. Such a judgment, it has been held, will be reversed on a writ of error brought by a member of the corporation whose property has been levied upon under an execution issued to enforce the same. (*Merrill v. Suffolk Bank*, 31 Me. 57, [1 Am. Rep. 649]; Thompson on Corporations, sec. 6725.) We know of no good reason why such a person may not be permitted to appear in the original action against the corporation, and there assert his claim. As said in *Combes v. Keyes*, 89 Wis. 297, [46 Am. St. Rep. 839, 62 N. W. 89], "from the very nature of things the dissolution or death of a corporation defendant, like the death of a party to a pending action, can only be brought to the attention of the court by some one other than the defunct corporation." In *First National Bank v. Colby*, 21 Wall. 609, it was held that the application of the receiver of such a corporation for a discharge of an attachment issued against the corporation should have been granted, although he was not a party to the action. And on the former appeal in this case, it was held in affirming the order made on the motion of the respondents here, vacating the former judgment against the Vivienda Water Company, upon the ground that the same was void for want of power in the clerk to enter it, that the respondents had such interest as entitled them to make the motion. The court said: "These defendants were not only successors in interest of the property involved, but were liable as stockholders for any valid judgment against the corporation. As stockholders they were made parties defendant to recover from them a judgment covering the same liability for which the corporation was sued. If this judgment should stand, we do not see why under some circumstances it might not fix by that much the stockholders' liability, and if this be true they were directly interested in the judgment. But it has been held by this court that one who succeeds to property that is subject to a judgment may appear to have it vacated, though he was not a party to the judgment." We regard this as decisive here. The fact that the action has now been dismissed as to respondents is immaterial. They were not parties to the judgment on the former appeal.

There is nothing in the record which would justify a conclusion that these respondents are estopped from asserting the invalidity of the judgment against the alleged corporation. Their verified answer, filed February 1, 1895, in terms denied the existence of the corporation, and alleged its dissolution, as has already been seen, and there was no subsequent act upon the part of any of them tending to contradict this. This answer, filed almost at the very commencement of the action, entirely overcame any effect in the direction of an estoppel on respondents that might have been contended for the prior filing of a demurrer on the part of the corporation by an attorney and the prior acceptance of service of summons by respondent Holbrook as president of the corporation. It should be noted in this connection that there was a sufficient showing made on the hearing of the motion to warrant the conclusion that the attorney filing the demurrer included the corporation as a demurrant inadvertently and without being authorized to do so.

So far as the dead corporation itself is concerned, there could be no admission or estoppel. It could not be served with process, could not appear, could not itself admit anything, nor authorize any one else to do so for it. It was legally dead. The proceedings against it must be held to be an absolute nullity whenever it is made to appear that it had ceased to be prior to the commencement of the action, and those sufficiently interested to be allowed to assail the judgment on this ground cannot, unless estopped by their own acts or omissions, be held bound by any unauthorized appearance or admission attempted to be made on behalf of the dead corporation, or by the entry of the default of such a corporation attempted to be made in such action.

The motion to vacate the judgment did not come too late, even if it be assumed that the provisions of section 473 of the Code of Civil Procedure as to the time within which relief can be granted are applicable to a case of this character. The application was made within six months of the date of entry of judgment, the time prescribed in that section for the making of application for relief. Whether or not it was then too late to obtain in the action an order setting aside the default is immaterial. It is enough for all the purposes of this appeal that the judgment was void for the reason that it was given

against a corporation that had become legally dead, and that the application for the vacating of this judgment was made within six months of its entry.

The order appealed from is affirmed.

Shaw, J., Sloss, J., McFarland, J., Henshaw, J., and Lorigan, J., concurred.

[L. A. No. 1612. Department One.—February 25, 1907.]

J. IRVIN GRAGG, Appellant, v. J. W. COOPER, E. S. SHEFFIELD, and CHARLES A. EDWARDS, Respondents.

PUBLIC LANDS—HOMESTEAD CLAIM—LAND ACTUALLY POSSESSED NOT SUBJECT TO ENTRY.—Public land of the United States actually occupied and possessed by one who has it inclosed by a substantial fence, and is using it for agricultural purposes, without other right, is not subject to entry by a qualified claimant under the Homestead Laws of the United States; and the process of obtaining from the officers of the United States a certificate of such entry, and a receipt for fees paid, in pursuance of a declaration of his intention to settle upon the land as a homestead, filed with them, does not authorize him to go upon the land so possessed and oust the prior possessor, or to recover the possession in an action against him.

ID. — EXCEPTIONS TO RULE — LAND POSSESSED CONSTRUCTIVELY OR IN PART SUBJECT TO ENTRY.—If public land is possessed only constructively, or is actually possessed only in part of a quarter-section, such possession does not preclude a qualified homestead claimant who has filed upon a quarter-section from entering upon that part of the homestead claim not actually possessed, and thus obtaining a title to the whole quarter-section, which will prevail as to the whole land declared upon. But these exceptions have no application where the whole land declared upon is in the actual possession of another.

APPEAL from a judgment of the Superior Court of Santa Barbara County. J. W. Taggart, Judge.

The facts are stated in the opinion of the court.

W. S. Day, for Appellant.

Canfield & Starbuck, for Respondents.

SHAW, J.—The plaintiff appeals from a judgment in favor of the defendants in an action by plaintiff to recover possession of a tract of land.

The land in question was, on and prior to February 24, 1903, a part of the public lands of the United States. At that time, and for a long time prior thereto, the defendants and their predecessor in interest had been in possession of the land, had inclosed it by a substantial fence, and were, and had been, using it for agricultural purposes, claiming title thereto. On that day the plaintiff, who was a person qualified under the laws of the United States to take up public lands as a homestead, made a homestead filing for the land in the United States land-office, paid the required fees therefor, and obtained the usual receipt or certificate of said entry. Afterwards, on April 6, 1903, he moved on the land with his family and occupied a portion thereof, claiming it all as a homestead. The record does not show that his entry was forcible or surreptitious, and consequently we must presume that it was open and peaceable. Subsequently the defendants ousted him, and he thereupon began the present action. The defendants have no title to the land, nor any right to the possession thereof, except such as may arise from their prior actual possession and inclosure at the time of the homestead entry of plaintiff.

The question thus presented by the record is whether or not public land of the United States which is in the actual occupancy and possession of one who has it inclosed by a substantial fence and is using it for agricultural purposes, but is without other right, can be entered as a homestead by another person by filing his homestead declaration with the receiver of the land-office, paying the fees, obtaining the proper certificate therefor, and thereafter taking peaceable possession of the land, or some part thereof, in pursuance of his claim.

The law seems to be settled that such land, so occupied and possessed by another is not subject to entry by a qualified claimant under the Homestead Laws of the United States, and that the process of obtaining from the officers of the United States a certificate of such entry and a receipt for the fees paid, in pursuance of a declaration of intention to settle upon the land as a homestead, filed with them, does not give the homestead claimant the right to go upon the land and oust the prior possessor, either by force of arms or by

process of law in an action for possession. In the leading case of *Atherton v. Fowler*, 96 U. S. 514, the proposition was laid down that the law of the United States on the subject did not authorize or contemplate an entry on land then in the actual possession of another, and that land so occupied was not subject to entry by another under the Homestead or Pre-emption laws, although it would have been but for the prior possession. In that case there had been no certificate issued, but the entry was made with the intent to purchase it under the Pre-emption Law. The appellant seeks to distinguish it from the present case on the ground that the certificate was here actually issued and that its effect was to vest in the plaintiff the equitable title, which should prevail over the defendants, who are in possession without title.

The reason of the rule, however, applies in one case as fully as in the other. The foundation of it is that such entries would inevitably lead to strife, violence, and perhaps bloodshed. In this state the rule has been repeatedly applied in cases where there had been the usual filing of the declaratory statement and issuance of the certificate by the officers of the land-office to the claimant, the land being at the time in the actual possession of some other person. (*Godwin v. McCabe*, 75 Cal. 588, [17 Pac. 705]; *McBrown v. Morris*, 59 Cal. 64; *Davis v. Scott*, 56 Cal. 165.) In these cases it is held that such an entry under the Homestead or Pre-emption laws is invalid, although the entry is open and peaceable, but that it is valid if the prior possession is not actual, but merely constructive. In the present case the court finds that there was an *actual* prior possession, inclosure, and use.

An exception to the rule is made in some of the cases, but it has no application to the case at bar. It has been held that where the prior occupant has possession of a part only of a governmental subdivision of public land, and the claimant enters upon the unoccupied part, claiming the right to enter the whole of it, and in pursuance of such claim files his declaratory statement and obtains the certificate of entry on the whole tract, he will be allowed to recover the possession of the part occupied by the prior possessor. (*Whittaker v. Pendola*, 78 Cal. 296, [20 Pac. 680]; *Haven v. Haws*, 63 Cal. 514.) In the first case, the homestead claimant entered upon three acres of the tract which the other party had not inclosed

or occupied. In the second he claimed a tract containing one hundred and sixty acres, under an entry upon one half of it, which was unoccupied, the other half being in actual possession of the other party. In the case at bar the plaintiff entered upon the inclosure of the defendants. When the reasons for the doctrine stated in *Atherton v. Fowler*, 96 U. S. 514, are considered, the distinction between these cases and the others clearly appears. Where the applicant can find a part of the land unoccupied he is at liberty to enter thereon, and can do so without danger of the strife, altercations, violence, or breaches of the peace such as would be invited by an entry upon the actual possession of another. The reason of the rule does not exist and the rule ceases. Having the right to take up this part of the land, and having obtained the evidence of title to the whole thereby, his title will prevail over the person in possession who can show no title whatever, but merely possession.

We think the court below correctly held that the plaintiff was not entitled to recover.

The judgment is affirmed.

Angellotti, J., and Sloss, J., concurred.

[L. A. No. 1653. Department Two.—February 26, 1907.]

CHARLES I. TRAVELLI, and DAVID WITHINGTON,
Respondents, v. M. S. BOWMAN, Administrator of the
Estate of George R. Senior, Deceased, Appellant.

DEED OF TRUST—REFORMATION OF DESCRIPTION OF PROPERTY—OUTLAWED NOTE.—Where the property secured by a deed of trust located the property described in the wrong county, an action may be commenced in the county in which the property deeded was in fact located, to have the deed reformed, notwithstanding the note secured thereby was barred by the statute of limitations when such action was brought.

ID.—EFFECT OF DEED OF TRUST—TITLE IN TRUSTEE—POWER TO SELL FOR OUTLAWED DEBT.—A deed of trust to secure a debt is not a mortgage, but passes the legal title to the trustee, for the purposes of the trust which remains in him until the debt is paid or a sale is made

of the premises under the deed; and the fact that the debt secured is outlawed does not affect the title of the trustee, or his power to sell to pay the debt.

ID.—EFFECT OF REFORMATION OF DEED.—The reformation of the deed so as correctly to describe the property secured is not to do a vain thing, but to perfect a valuable right to property in the trustee for the purposes of the trust.

ID.—LACHES—DISCOVERY OF MISTAKE.—Laches is not imputable to the creditor or the trustee, where they had no knowledge of the mutual mistake in the description of the property until about one month prior to the commencement of the action to reform the deed.

ID.—IGNORANCE OF TRUSTEE—FAILURE TO EXAMINE DEED.—The fact that the trustee, who did not know that the trust-deed was among his papers, did not examine the deed so as to discover the mistake, is not evidence of any laches that would defeat the action to reform the deed. The mere failure of the grantee to read the instrument with sufficient attention to perceive the error or defect in its contents will not prevent its reformation at his suit.

APPEAL from a judgment of the Superior Court of Riverside county and from an order denying a new trial. J. S. Noyes, Judge.

The facts are stated in the opinion of the court.

Purington & Adair, for Appellant.

Withington & Carter, and Collier & Carnahan, for Respondents.

McFARLAND, J.—This action was brought against M. S. Bowman, administrator of the estate of George R. Senior, deceased, to obtain a judgment reforming the description of land in a certain deed of trust. Judgment went for plaintiffs, in accordance with the prayer of the complaint, and from the judgment and from an order denying his motion for a new trial the defendant appeals.

The main features of the case are these: In March, 1896, George R. Senior, since deceased, was, and for a long time prior thereto had been, indebted to the plaintiff Travelli in a large sum of money, secured by a mortgage on certain real property situated in the county of Riverside. The debt secured by the mortgage was about to be outlawed when the plaintiff Travelli, who lived in Massachusetts, employed the

plaintiff Withington, a lawyer practicing in San Diego, California, to look after his claim against Senior and make some disposition of it. Withington went to Riverside and had an interview with Senior, and it was finally agreed that Senior should make a new note to Travelli for eighteen thousand dollars and give a deed of trust to Withington to secure the payment of the same, and that the mortgage should be discharged. Withington went back to San Diego and had a draft of the note and deed of trust prepared, which he gave to one Carter, who was a clerk in his office, to copy. When Carter presented the deed to Withington the latter discovered that he had described the land as in San Bernardino County, when in fact it was in Riverside. He told Carter to make the correction and to then send the deed on to Senior to be executed, Withington going away from home for a few days. Carter corrected the deed, but unfortunately made another mistake by describing it as in San Diego County. He sent it on to Senior, by whom it was executed and returned to Carter. Carter had been instructed by Withington to send the deed on to Travelli in Massachusetts, but for some reason this was not done, and the deed was left among the papers in Withington's office. There was also another defect in the description. Withington did not see the deed or know of the misdescription until after the death of Senior, which occurred on or about the 10th of July, 1903. Upon the death of Senior, Withington commenced to look for papers connected with the business between Senior and Travelli, and found the deed in his office, and noticed for the first time the misdescription. This action was commenced within a month after the discovery of the mistaken description. At the time of the commencement of this suit the said note of Senior to Travelli had been outlawed for the period of about a month. Appellant pleaded the several provisions of the code touching the limitations of actions.

The main contention of appellant for a reversal is that the reformation of a trust-deed should not be granted by a court of equity after the note which is secured by the deed has been barred by the statute of limitations. This contention is not maintainable. Appellant has cited some cases to the point that a court of equity will not entertain a suit to reform a deed where it appears that the plaintiff would have no rights under the deed when reformed, and that the reformation would.

be a mere vain act. The theory of those cases is well illustrated by the case of *Thompson v. Phœnix Ins. Co.*, 25 Fed. 296. The action there was to reform a policy of insurance issued by defendant, and to recover on the reformed policy. It appeared, however, that the contract sued on and set out in the complaint contained a provision that no action could be maintained thereon unless brought within twelve months next after the date of the fire from which loss should accrue, and it appeared that in that case the time had expired, so that, even though the policy should be reformed, the plaintiff would have no legal rights whatever under it as reformed; and the court very properly held that it would not undertake the work of reformation when it was apparent that it would be a vain thing to do it. The court said: "But the court will not reform an instrument merely for the sake of reforming it, but only to enable a party to assert some right thereunder. And if an action thereon by the assured to recover the amount of loss is already barred by lapse of time, there is no claim that can be asserted under it against the defendant." But no such principle applies in the case at bar. The deed in question in this case is a typical deed of trust to secure a debt, well known under the California law; and it has been frequently held here that such a deed is not a mortgage, but conveys the title to the trustee for the purposes of the trust, and that the title remains in the trustee, unless the debt has been paid or a sale made of the premises under the deed. The fact that the debt secured has become outlawed does not affect the title of the trustee. (*Grant v. Burr*, 54 Cal. 298; *Savings and Loan Society v. Burnett*, 106 Cal. 528, [39 Pac. 922]; *Weber v. McCleverty*, 149 Cal. 316, [86 Pac. 706].) By the reformation of the deed in question here the plaintiffs are therefore put into the position of holding and asserting title to the land in question until the truster should have become entitled to a reconveyance by payment of the debt and to sell the property under the deed. To reform the deed, therefore, is not to do a vain thing, but to perfect a valuable right to property in the respondent.

The other points made by appellant may be condensed into the asserted proposition that plaintiffs have by want of diligence in discovering the mistake been guilty of laches, which estops them from maintaining the action. We do not think

that this contention is available. The court found "that plaintiffs, David L. Withington and Charles I. Travelli, or either of them, did not discover, nor had they or either of them, any knowledge of said mutual mistakes in the description of said property, as contained in said deed of trust, until on the 14th day of July, 1903, about one month prior to the commencement of this action," and did not "have any knowledge of any fact or facts sufficient to put them, or either of them, upon inquiry as to said mutual mistake until the 14th day of July, 1903, and after the death of said George R. Senior," and "at all times believed, and, as reasonably prudent men, had reasonable cause to believe, that the descriptions contained in said deed of trust were correct and in accord with the intentions of the parties to said instrument, viz.: Charles I. Travelli, David L. Withington and George R. Senior." And we think that these findings were amply supported by the evidence. The mere fact that Withington, who did not know that the deed was among his papers, did not examine it, is not evidence of any laches that would defeat this action. In *Los Angeles etc. R. R. Co. v. New Liverpool Salt Co.*, ante, p. 21, [87 Pac. 1029], this court says: "It has been frequently decided that the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly," (citing cases). And certainly such rule applies to the grantee in a deed as strongly as to the grantor.

We see nothing more in the other contentions of appellant which requires special notice.

The judgment and order appealed from are affirmed.


Lorigan, J., and Henshaw, J., concurred.

[L. A. No. 1676. Department One.—February 27, 1907.]

CHESTER WILLIAMS, Appellant, v. LOS ANGELES
RAILWAY COMPANY, Respondent.

LOT FRONTING ON STREET—PRIVATE EASEMENTS AS APPURTENANCES.—

Every lot fronting upon a street has as appurtenances thereto certain private easements in the street in front of and adjacent to the lot, which are part of the lot, and are private property as fully as the lot itself, though exercised in the street and extending into and over the street.

 **ID.—NATURE OF PRIVATE EASEMENTS.—**The private easements appurtenant to the lot are: First, the right of ingress and egress to and from the lot over and by means of the street; second, the right to receive light from the space occupied by the street, and to the circulation of air therefrom; and, third, the right to have the street space kept open so that signs or goods displayed in and upon the lot may be seen by the passersby, in order that they may be attracted as customers.

ID.—OBSTRUCTION TO USE OF STREET—PRIVATE INJURY TO OWNER OF LOT—DAMAGES—INJUNCTION.—Any obstruction to the use of the street, which impairs or destroys the private easements appurtenant to an abutting lot, is a private injury to the owner of the lot, different and distinct from the injury to the general public; and the owner may maintain an action for damages for the injury, or for an injunction to prevent its continuance, regardless of the fact that the same obstruction also constitutes an injury to the public right of travel, and regardless of the number of persons who may suffer a similar injury to private easements appurtenant to other lots fronting on the street.

ID.—ERECTION OF SWITCH-TOWER IN STREET—FRANCHISE FOR ELECTRIC RAILWAY—POWER OF CITY AUTHORITIES.—The erection of a switch-tower on the street in front of plaintiff's lot, which is an obstruction to some extent to the exercise of the private easements of plaintiff, is not included in the granting of a franchise to lay tracks in the streets, and to run cars thereon by electricity, if it can be placed on private property, at whatever cost, and can there be used in substantially the same manner, and, if so, the city authorities cannot give the right to put it in the street, to the detriment of the private rights of the plaintiff, without first making compensation to him for the damage caused thereby, if any.

ID.—EXTENT OF DAMAGE—INJUNCTION PENDENTE LITE—GRANTING OR REFUSAL IN DISCRETION OF COURT.—The question as to the extent or slightness of the damage caused by the obstruction, or whether it ought to justify an injunction *pendente lite*, was a matter for the determination of the trial court; and the question of granting or re-

fusing an application for a temporary injunction was addressed to the discretion of the lower court, and its action in refusing it will not be disturbed on appeal, where there appears to be no clear abuse of discretion.

Id.—QUESTION FOR FINAL HEARING.—If the damage or injury threatened is of a character which may be easily remedied, if the injunction is refused, as where it is chiefly monetary damage, and the defendant is solvent, the court, in its discretion, may refuse to issue a temporary injunction, leaving the question for the final hearing, at which the court could allow compensation in the action, under the prayer for general relief, and could in the final judgment restrain the use of the tower, or command its removal, unless the damage was paid within a time fixed.

APPEAL from an order of the Superior Court of Los Angeles County refusing to grant an injunction *pendente lite*.
M. T. Allen, Judge.

The facts are stated in the opinion of the court.

Works, Lee & Works, for Appellant.

Bicknell, Gibson, Trask, Dunn & Crutcher, for Respondent.

SHAW, J.—This is an appeal from an order refusing an application for an injunction pending the action.

The plaintiff was the owner of a lot and of the building thereon situated on the corner of Spring and Fourth streets, which is about the business center of the city of Los Angeles. The building was used for a retail curio store, and among its advantages were those arising from its position on the street, consisting of the facilities thereby afforded for the display of signs advertising the business, its accessibility, and the free admission of light and air. The defendant was operating a system of electric street railways passing along both of the streets and turning each corner of the intersection. It had previously kept a man employed to turn the switches and signal the men operating the cars at the proper time to cross the intersection or turn the corner into the other street. For the purpose of facilitating this work, the defendant erected a large iron post, or pedestal, twelve inches in diameter and about ten feet high, and placed thereon a switch-tower four feet two inches wide and over nine feet high above the top of the post. The post was situated on the sidewalk of Spring

Street some two or three feet north of the north line of Fourth Street and about nine feet from the walls and windows of the plaintiff's building. This tower was to be used as a signal station, and in it was to be stationed a man who, by means of electric wires extending from the tower to the switches, was to turn the switches, and by semaphore signals was to direct the running of the cars, as was formerly done by the switchman on the street. At the time the complaint was sworn to the tower had not been placed on the post, but before the preliminary restraining order was served it had been so placed, though not entirely completed ready for operation.

Every lot fronting upon a street has, as appurtenances thereto, certain private easements in the street, in front of and adjacent to the lot, which easements are a part of the lot, and are private property as fully as the lot itself, though exercised in the street and extending into and over the street. Any obstruction to the use of the street which impairs or destroys these easements is a private injury, special and peculiar to the owner of the lot, and different and distinct from the injury to the general public and from that which such owner suffers as a part of the general public. As one of the public he has the right to travel from place to place on the street, in front of his lot or elsewhere. Any injury to this public right gives him no right to maintain an action for damages, or for an injunction. As an abutting owner, he has the right to the private easements in question, and for an injury thereto he may sue for damages or to enjoin the continuance of the injury, regardless of the fact that the same obstruction also constitutes an injury to his public right of travel, and regardless of the number of persons who may suffer a similar injury to similar private easements appurtenant to other lots fronting on the street.

These private easements are,—1. The right of ingress and egress to and from the lot over and by means of the adjacent portion of the street (*Eachus v. Los Angeles Ry. Co.*, 103 Cal. 617, [42 Am. St. Rep. 149, 37 Pac. 750]; *Bigelow v. Ballerino*, 111 Cal. 563, [44 Pac. 307]; *Geurkink v. Petaluma*, 112 Cal. 308, [44 Pac. 570]; *Symons v. San Francisco*, 115 Cal. 557, [42 Pac. 913, 47 Pac. 453]; *Sievers v. San Francisco*, 115 Cal. 653, [56 Am. St. Rep. 153, 47 Pac. 687]; *Bancroft v. San Diego*, 120 Cal. 437, [52 Pac. 712]; *Eachus*

v. *Los Angeles*, 130 Cal. 495, [80 Am. St. Rep. 147, 62 Pac. 829]); 2. The right to receive light from the space occupied by the street, and to the circulation of air therefrom (*Brown v. Board*, 124 Cal. 280, [57 Pac. 82]; *Townsend v. Epstein*, 93 Md. 537, [86 Am. St. Rep. 441, 49 Atl. 631]; *Field v. Barling*, 149 Ill. 556, [41 Am. St. Rep. 311, 37 N. E. 850]; *Shepard v. Manhattan Ry. Co.*, 117 N. Y. 442, [23 N. E. 31]; *Story v. New York etc. R. R. Co.*, 90 N. Y. 122, [43 Am. Rep. 146]; *Lohr v. Metropolitan El. R. R. Co.*, 104 N. Y. 268, [10 N. E. 531]; 2 Dillon on Municipal Corporations, 4th ed., sec. 712); and 3. The right to have the street space kept open so that signs or goods displayed in and upon the lot may be seen by the passersby, in order that they may be attracted as customers to patronize the business carried on thereon. (*First Nat. Bank v. Tyson*, 133 Ala. 459, [91 Am. St. Rep. 46, 32 South. 144]; *Dill v. Board*, 47 N. J. Eq. 421, [20 Atl. 743]; *Hallock v. Scheyer*, 33 Hun, 111.) The plaintiff, as the owner of the lot abutting on the street, was possessed of these private easements. The structure erected by the defendant was, at the place where it was situated, to some extent an obstruction to the exercise of all of these easements. To the extent of the space occupied, it absolutely excluded all other use, either for passage, light, air, or view. Whether the damage and obstruction thereto was so slight as to come within the *de minimis* rule, or was sufficient to justify an injunction *pendente lite*, was a matter for the determination of the court below.

The allegations of the answer do not show that it was necessary to the operation of the street-cars that the tower should be placed in the street. They show, only, that it was necessary, if it was to be used at all, that it should be placed "at the intersection." But for all that appears it would have served its purpose as well if erected upon private property at the apex of either of the four corner lots at the intersection, and within the property line. The photographs of the place, included in the record, make it extremely probable that this is the case, if they do not absolutely demonstrate the fact. The granting of the franchise to lay tracks in the streets and run cars thereon by electricity did not carry the right to erect such a structure as this tower in the street,—at any rate, not unless it is shown that it cannot be made of practical

thereof. The attaching creditor of the devisee was not required to present his claim to the probate court, and was not entitled to participate in the distribution of the estate; but the property distributed continued to be subject to the lien of the attachment if legally levied thereupon.

ID.—SHERIFF'S DEED UNDER EXECUTION—RELATION TO ATTACHMENT LEVY.—A sheriff's deed executed in pursuance of an execution sale under a judgment rendered in an attachment suit relates back to and takes effect from the levy of the attachment, if sufficient to create a lien.

ID.—PREVALENCE OF TITLE—DISTRIBUTION TO GRANTEE OF DEVISEE—DEED AFTER ATTACHMENT LEVY.—A sheriff's deed under an execution sale to the defendant, which relates to the date of an attachment levy, in a suit against the original devisee, will prevail over the title of the plaintiff, who took distribution as grantee of the devisee, where the deed of the devisee to the plaintiff was executed after the attachment levy.

ID.—AFFIDAVIT AND BOND FOR ATTACHMENT—WRITS TO DIFFERENT COUNTIES AT DIFFERENT TIMES.—Several writs of attachment to different counties, though they may be issued at the same time, are not required to be so issued; but writs to different counties may be issued at different times on the same affidavit and bond, provided they are issued within a reasonable time after the making and filing of the affidavit.

ID.—TIME FOR WRIT NOT PRESCRIBED—DELAY FOR "UNREASONABLE TIME."—Our statute does not prescribe the time within which, after the making and filing of the affidavit, a writ of attachment may legally issue, nor limit the force and effect of the affidavit to any specified time after its execution, if the writ be not delayed thereafter for an "unreasonable time," whereby is meant such delay as would, under the circumstances, cast suspicion on the verity of the affidavit, or lead to the supposition that the ground stated for the attachment had ceased to exist.

APPEAL from a judgment of the Superior Court of San Bernardino County. F. F. Oster, Judge.

The facts are stated in the opinion of the court.

James H. Boyer, for Appellant.

Naphtaly, Freidenrich & Ackerman, and Waters & Wylie, for Respondent.

ANGELLOTTI, J.—This is an action to quiet title, involving an undivided half of the northeast quarter of the northeast

quarter of section 10, Township 1 south, range 7 west, San Bernardino base and meridian, in San Bernardino County. From a judgment therein in favor of defendant the plaintiff appeals.

Cerverio Martinovich died testate on February 6, 1889, the owner of the property above described. By the terms of his will, the undivided one half thereof in controversy was devised to his widow, Sophia Martinovich. On December 1, 1897, defendant commenced an action in the superior court of the city and county of San Francisco against said Sophia Martinovich. On December 16, 1897, he filed in said action an affidavit and an undertaking for attachment in regular form, and on that day a writ of attachment was regularly issued from said court, directed to the sheriff of the city and county of San Francisco. On December 18, 1897, without filing any new affidavit or undertaking, he procured to be issued by said clerk another writ of attachment in said action, directed to the sheriff of San Bernardino County. Under this writ, the property involved was attached on December 20, 1897, by the sheriff of San Bernardino County, in the manner provided by law. On February 14, 1898, no motion to dissolve said attachment ever having been made, judgment was given in said action in favor of this defendant and against Sophia Martinovich for \$3,083.19, and a transcript of the original docket of this judgment, duly certified, was filed and recorded in the office of the county recorder of San Bernardino County on April 8, 1898. On June 30, 1898, execution was duly issued out of the superior court of the city and county of San Francisco, and levied by the sheriff of San Bernardino County on this property, and he, after due notice, on July 25, 1898, sold the property at public sale to defendant. No redemption having been made, said sheriff, on December 16, 1899, executed a deed for the property to defendant.

In the mean time, on March 29, 1898, which was after the attempted levy and the judgment, but prior to the filing of the transcript of the docket in San Bernardino County, Sophia Martinovich executed and delivered a conveyance of the property to plaintiff. This deed was not recorded until February 20, 1903. On March 30, 1898, a decree of final distribution in the matter of the estate of Cerverio Martinovich was made by the superior court of the city and county of San Francisco,

and by this the property here involved was distributed to plaintiff, it being recited in the decree that it had been made to appear to the court that said Sophia had transferred the same to plaintiff. This decree was entered in the minutes of the court April 21, 1898, and a certified copy thereof was recorded in the office of the county recorder of San Bernardino County on June 25, 1898, which was before the sheriff's sale.

Upon these facts judgment was properly given for defendant.

Such rights as defendant may have had under the attachment levy were in no way affected by the decree of distribution. He was not required to present his claim in this behalf to the probate court and was not entitled to participate in the distribution of the estate, and the property distributed continued to be subject to the lien of his attachment, if the property had been legally attached, which for the present we assume to have been the case. (See *Martinovich v. Marsicano*, 137 Cal. 354, [70 Pac. 459].)

Concededly, a sheriff's deed executed in pursuance of an execution sale under a judgment rendered in an attachment suit relates back to and takes effect from the levy of the attachment, if the levy was such as to create a lien. (*Porter v. Pico*, 55 Cal. 165, 171; *Godfrey v. Monroe*, 101 Cal. 224, [35 Pac. 761]; *Woodward v. Brown*, 119 Cal. 283, 306, [63 Am. St. Rep. 108, 51 Pac. 2, 542].) If the attachment was valid, plaintiff therefore acquired the property from Sophia Martinovich subject thereto, and subject to the subsequent proceedings to enforce the judgment recovered against her.

Plaintiff claims that there was no valid attachment as to this property, for the single reason that the San Bernardino writ was issued by the clerk without the giving by plaintiff of any additional affidavit or undertaking. Manifestly, it was considered sufficient that an affidavit showing a proper case for an attachment and an undertaking in due form had been filed two days before. We have no doubt that such affidavit and undertaking constituted a sufficient legal basis for the writ. It is not claimed that several writs may not be issued upon a single affidavit and undertaking to the sheriffs of different counties. That this may be done is clearly shown by the statute. (Code Civ. Proc., secs. 537-540.) But it is

contended that all writs so issued must be issued at the same time. This contention is based upon the fact that sections 538 and 539 of the Code of Civil Procedure require the clerk to issue the writ upon receiving the affidavit and undertaking, and that section 540 of the Code of Civil Procedure, after declaring that the writ must be directed to the sheriff of any county in which property of the defendant may be, and in terms require him to attach and safely keep all property of the defendant within his county not exempt from execution, provides: "Several writs may be issued at the same time to the sheriffs of different counties." This provision of section 540, as we read it, was intended solely in aid of the plaintiff in attachment, and the whole purpose was to authorize such a plaintiff to have at one time two or more writs addressed to sheriffs of different counties, so that property of the defendant in various counties necessary to secure the plaintiff's claim may be levied on under the one proceeding for attachment instituted by him. The plaintiff in attachment is, by virtue of the showing made and security given, entitled to have as many writs issued to different sheriffs as he may see fit to demand. All writs so demanded and issued constitute parts of the one proceeding to have the property of the defendant in the state levied on as security for any judgment that may be obtained, and have for their basis the affidavit and undertaking given to secure the remedy of attachment. If by his first demand he has failed to ask for and secure a writ for a county in which he almost immediately thereafter discovers attachable property necessary to his security, no good reason is apparent why he may not reach such property by procuring what he would have been entitled to as a matter of right in the first instance by including it in his demand to the clerk, thus accomplishing the same result that he would be enabled to obtain as to property subsequently discovered in a county for which a writ had issued, before the return of the attachment, by a simple direction to the sheriff. The mere fact that a writ has been issued as to one county of the state should not deprive the plaintiff of his right to a writ for any other county, and the statute does not, in our opinion, have any such effect. Such fact does not detract from the power and duty of the clerk to issue, upon the affidavit and undertaking already filed, writs to other counties as demanded.

It is urged that if the statute be so construed as to authorize a second writ subsequent to the issuance of the first, conditions may have so changed in the mean time that the affidavit no longer speaks the truth as to the matters essential to the right of attachment. This, however, would be true as to any writ of attachment issued. It has not been attempted to prescribe by our statute the time within which, after the making or filing of the affidavit, a writ may legally issue, nor to limit the force and effect of the affidavit to any specified time after its execution. Some time must, from the nature of things, elapse between the making of the affidavit or its filing, and the issuance of any writ, during which time, however short, a change *may* occur as to some fact required to be alleged in such affidavit. It is impossible to absolutely prevent this, as successive steps in a proceeding cannot be contemporaneously taken. The mere requirement that all writs issued should be concurrently issued would not absolutely prevent it. It was said in *Wheeler v. Farmer*, 38 Cal. 203, 215, that an objection that an affidavit for attachment was made before the commencement of the suit was manifestly untenable, and that there was no valid objection to a complete preparation of all the papers requisite to the writ before the complaint was prepared. It has been said elsewhere that, as the ground of attachment must exist at the time the warrant of attachment was issued, an unreasonable time should not be allowed to elapse between the making of the affidavit and the issuance of a writ. By the term "unreasonable time," as herein used, is meant such delay as would under the circumstances cast suspicion on the verity of the affidavit, or lead to the supposition that the ground stated for the attachment had ceased to exist. (See *Kesler v. Lapham*, 46 W. Va. 293, [33 S. E. 289], and cases there cited.) We think that as to this particular matter the true rule, in the absence of statute to the contrary, is as stated in *Hadden v. Linville*, 86 Md. 210, [38 Atl. 900], where the objection was to the jurisdiction for the reason that the affidavit was made several months before the issuance of the attachment, the appellant insisting that the affidavit must be made either at the time of the institution of the suit or as shortly before as conveniently might be. The court said: "But while we are of opinion that there may be such delay

between the making of the affidavit and the suing out of the writ as may reasonably induce a presumption, when taken in connection with other facts properly proven, that the process of the court is being abused, or that the facts set forth in the affidavit may not be true when the suit is instituted, yet we do not think such divergence of dates is a jurisdiction matter, that will enable this court on appeal, to consider the question in a case like the one at bar, where the point was not raised and considered below on appropriate motion or plea." This is as applicable to a second writ issued to another county after the issuance of the first writ, as it is to a case of delay between the making of the affidavit and the procuring of the first writ. The protection afforded by the law to the defendant against an improper attachment is as broad in the one case as in the other. In each, no jurisdictional defect being apparent on the face of the proceeding, his only remedy, under our system, is a motion to set aside the attachment, and on this motion the showing made by the affidavit in support of the judgment can be assailed, and the attachment which has been improperly issued discharged. (Code Civ. Proc., secs. 556-558.) The reason advanced by plaintiff in support of the construction of section 540 contended for by him appears to us to be without force.

The San Bernardino writ of attachment must here be held to have been legally issued. Admittedly, the levy thereunder was in full compliance with the statute. The attachment proceedings operated, therefore, to render the subsequent sheriff's deed effectual from the date of the levy, and paramount to plaintiff's deed from Sophia Martinovich, executed subsequent to such levy.

The judgment is affirmed.

Shaw, J., and Sloss, J., concurred.

[S. F. No. 4597. Department Two.—February 28, 1907.]

In the Matter of the Estate of ROBERT RUSSELL, Deceased. WILLIAM RUSSELL, Appellant, v. MARIA KIP ORPHANAGE, Respondent.

WILLS—VOID DEVISE TO CHARITABLE SOCIETY.—Under section 1313 of the Civil Code a devise to a charitable society, made less than thirty days before the decease of the testator, is void.

IN.—COMMON-LAW RULE ABROGATED—VOID DEVISE—TITLE OF HEIRS—RESIDUARY DEVISE.—The common-law rule, that a devise of real property speaks as of the date of the will, is abrogated by section 1332 of the Civil Code, providing that "A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will," and an invalid or ineffectual devise of real property in this state does not pass to the heirs, but must go to the residuary devisee, unless a contrary intent is clearly expressed by the terms of the will.

APPEAL from a judgment of the Superior Court of Santa Cruz County. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Duncan McPherson, Jr., for Appellant.

Elliott McAllister, Charles M. Cassin, Cassin & Lucas, and Charles B. Younger, Jr., for Respondent.

HENSHAW, J.—Appellant instituted proceedings under section 1664 of the Code of Civil Procedure to have determined his interest in the estate of Robert Russell, deceased. The facts are that Robert Russell executed his last will and testament on October 20, 1903, and seven days thereafter died. His will was duly admitted to probate. The fifth paragraph of the instrument provided:—

"Fifthly, I leave my farm, consisting of one hundred and ninety-seven acres within the city limits of Santa Cruz, to the Maria Kip Institute of San Francisco County and City, California, for them to sell or dispose of as seems best to the officers of said institute."

The sixth paragraph of his will declared:—

"Sixthly, I leave the rest, residue and remainder of my estate, whether real or personal, and wheresoever situated, to the other children of said Mary Barrett, widow, to be divided among them, share and share alike, exclusive of said Eugenie C. Barrett, for whom I have hereinbefore provided."

The Maria Kip Institute named in the fifth paragraph is conceded to be the Maria Kip Orphanage, which is a charitable and benevolent institution. Section 1313 of the Civil Code declares: "No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society, or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; . . . and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law." It is not disputed that the devise to the Maria Kip Orphanage thus made within thirty days of the death of the testator became void. Appellant, as an heir at law of William Russell, deceased, contends that this lapsed and void devise goes to the heirs at law, and not to the residuary legatees, notwithstanding the provisions of section 1332 of the Civil Code, which reads as follows: "A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will." The earlier common law made a distinction between devises of real property and bequests of personal property, the former speaking from the death of the testator, the latter from the date of the will. According to this distinction, it was held that real property did not go to the devisees under a general residuary clause, while personal property did go to the residuary legatees. But it is well settled that section 1332, above quoted, abrogates this rule of the common law. (*Estate of Upham*, 127 Cal. 90, [59 Pac. 315]; *O'Connor v. Murphy*, 147 Cal. 148, [31 Pac. 416].) It is thus the accepted rule in this state that where there is a valid general residuary devise real property mentioned in a lapsed or void devise goes to the residuary devisee, and not to the heirs, unless a contrary intent is clearly expressed by the terms of the will. (No such intent is here shown at all. The devise in this case is general and valid, and bestows upon the residuary

devises the property attempted to be devised to the Maria Kip Orphanage.

A motion to dismiss this appeal has been made by the Maria Kip Orphanage upon the ground that it was an adverse party and had not been served with notice. This determination of the question upon the merits renders unnecessary any consideration of that motion.

For the foregoing reasons the judgment appealed from is affirmed.

McFarland, J., and Lorigan, J., concurred.

[S. F. No. 3871. Department One.—March 1, 1907.]

JOHN P. DOHERTY, Respondent, v. HANORA COURTNEY, Appellant.

EJECTMENT AGAINST TENANT OF ADMINISTRATOR—DEFENSE.—A defendant in ejectment, claiming the right to the possession of the land sued for as the tenant of the administrator of a deceased prior owner, may set up any defense which the administrator could have urged to the action.

ID.—EQUITABLE TITLE AS DEFENSE IN EJECTMENT—RIGHT OF POSSESSION.—Under the California system of procedure, where legal and equitable remedies are administered in the same tribunal, and there are no special forms of action, a defendant may set up by way of equitable defense any matter which would, if presented by him as the basis of an original bill in equity, have entitled him to a judgment for the relief sought by his answer. This rule entitles the owner of a mere equitable title to land, if it is of such a character as entitles him to possession in equity, to set it up as a sufficient defense to an action for the possession, brought even by the holder of the legal title.

ID.—REPRESENTATIVE MAY ATTACK DEED MADE BY DECEDENT—UNDUE INFLUENCE.—In this state, an administrator or executor may maintain an action to set aside a deed made by his intestate or testator on the ground of undue influence exercised by the grantee; and a tenant of the administrator, if sued for the possession by a *mala fides* purchaser from such grantee, may set up as a defense that the deed was obtained by undue influence.

ID.—EVIDENCE OF MENTAL CONDITION OF DECEDENT—WANT OF CONSIDERATION.—In an action by a purchaser from the grantee under such

deed, to recover possession of the land from a tenant of the administrator in which the answer alleged that the decedent at the time of making the deed was "much impaired and weakened in mind and body, and incapable of properly taking care of property or property interests," evidence is admissible as to the mental condition of the decedent at the date of the execution of the deed, and to show that the plaintiff had paid no consideration for the deed to him.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Walter H. Linforth, and Jackson Hatch, for Appellant.

J. B. Carson, and Riordan & Lande, for Respondent.

SLOSS, J.—Action of ejectment, in which plaintiff recovered judgment. The defendant appeals from the judgment and brings the case up on the judgment-roll and a bill of exceptions.

Both parties claim under Catherine Black, who died some months before the commencement of this action. Plaintiff claims under a deed alleged to have been made by Catherine Black to John Pius Murphy on April 11, 1898, and a deed from John Pius Murphy dated March 18, 1902. The defendant claimed the right to possession as tenant of the administrator of Catherine Black's estate. By way of defense, the answer pleaded, among other things, that John Pius Murphy had procured the making of the deed by Catherine Black through undue influence exerted by him upon her, and in this behalf alleged more particularly that at the time of the execution of the conveyance of April 11, 1898, Catherine Black was advanced in years "and much impaired and weakened in mind and body, and incapable of properly taking care of property or property interests"; that at that time the said John Pius Murphy was the spiritual adviser of Catherine Black, and as such had acquired and possessed great influence over her; that without any consideration therefor, said John Pius Murphy, with the intent of depriv-

ing the legatees and devisees of said Catherine Black of their natural inheritance, and by reason of his influence over her, caused her to execute the deed to him. The answer further alleged that the deed from John Pius Murphy to the plaintiff was without consideration.

At the trial the plaintiff made out a *prima facie* case. The defendant, being called as witness on her own behalf, testified that she was the sister of Catherine Black, had been living on the premises with her sister until the latter's death, and that she had continued to live there ever since. She was then asked the following question: "What was the condition of your sister's mind on the 11th day of April, 1898?" This question was objected to upon the ground that it was immaterial, irrelevant, and incompetent, and on the further ground "that she claims to hold the possession of the property as the tenant of the administrator of the estate of Catherine Black, who has no standing in court either for the prosecution of an action as against these deeds, or as a defendant in this action." The court sustained the objection, taking the view that the administrator (or the defendant claiming under such administrator) had no standing to attack a deed made by the decedent upon the ground set up in the answer; that such attack could be made only by an heir or devisee of the decedent.

We think this ruling was clearly erroneous. The defendant, claiming the right to possession as tenant of the administrator, was entitled to set up any defense which the administrator could have urged to the action. Under our system of procedure, where legal and equitable remedies are administered in the same tribunal and there are no special forms of action, a defendant may set up by way of equitable defense any matter which would, if presented by him as the basis of an original bill in equity, have entitled him to a judgment for the relief sought by his answer. The rule has repeatedly been applied to actions of the character of the present one. In *Willis v. Wozencraft*, 22 Cal. 607, this court said: "A mere equitable title to land, if it is of such a character as entitles the holder to possession in equity, is a sufficient defense under our system of practice to an action for the possession, brought even by the holder of the legal title." (See, also, *Whittier v. Stege*, 61 Cal. 238; *Hicks v. Lovell*, 64 Cal. 17,

[49 Am. Rep. 679, 27 Pac. 942]; *Hyde v. Mangan*, 88 Cal. 319, [26 Pac. 180].)

Coming to the particular ground upon which the court below based its ruling, it is now no longer open to question that in this state an administrator or executor may maintain an action to set aside a deed made by his intestate or testator on the ground of undue influence exercised by the grantee. The question was fully discussed in *Collins v. O'Lavery*, 136 Cal. 31, [68 Pac. 327], in which the court said: "The sole test of the administrator's right of action is the right of the estate to the possession of the property. If the right exists then the right of action exists; and it will make no difference if, in order to recover property to the possession of which the estate is entitled, it should become necessary to cancel a voidable deed, or otherwise—according to the equity practice—to dispose of an outstanding legal title." It follows that the defendant was entitled to offer evidence in support of the allegations of her affirmative defense above set forth. One of these allegations was that the decedent at the time of executing the deed was "much impaired and weakened in mind and body, and incapable of properly taking care of property or property interests." The question asked the defendant was relevant to the issue thus raised, and was not open to any of the objections made to it. It is not claimed, and could hardly be, that the defendant, who had testified that she was the sister of the decedent and had been living with her, was not competent, under section 1870 of the Code of Civil Procedure, to give her opinion respecting the mental condition of Mrs. Black. The effect of the ruling was to deprive the defendant of all opportunity of proving matters set up by her in her answer, which, as we have seen, would, if established, have been a good defense to the action.

The court also excluded evidence tending to show that the plaintiff had paid no consideration for the deed to him, and was holding merely as a representative of Father Murphy. This evidence should have been admitted. The defendant was entitled to show that the property in the hands of the plaintiff was subject to any infirmity attaching to the title of his grantor.

In view of the conclusion reached, the other points made by the appellant do not require consideration.

The judgment is reversed and the cause remanded for a new trial.

Angellotti, J., and Shaw, J., concurred.

[L. A. No. 1736. Department One.—March 1, 1907.]

THE L. W. BLINN LUMBER COMPANY (a Corporation),
Respondent, v. CHARLES H. McARTHUR, Appellant;
REBECCA W. MOORE, Substituted as Plaintiff, Re-
spondent; WILL D. GOULD, Intervener and Appellant.

PARTIES — SUBSTITUTION OF DISTRIBUTE OF ESTATE — ASSIGNMENT —

FORECLOSURE.—Where pending an action of foreclosure a promissory note and mortgage are regularly assigned, and subsequently are distributed by the decree of distribution in the estate of the assignee, the distributee, as a successor in interest, has the right, under section 385 of the Code of Civil Procedure, to be substituted as plaintiff in the foreclosure suit, notwithstanding the fact that neither the assignee in his lifetime, nor his representative after his death, had been substituted as plaintiff.

ID.—PRIMA FACIE CASE—PROOF OF NON-PAYMENT OF NOTE.—Where it is admitted that at the time the suit was commenced the note was unpaid, the substituted plaintiff made out a *prima facie* case by the introduction of the assignment of the note and mortgage and the decree of distribution; and the burden of proving that the note had been subsequently paid was on a purchaser of the mortgaged premises, who had intervened in the action.

EVIDENCE — BOOKS OF BANK.—The books of a bank are admissible in evidence for the purpose of showing the state of the account of one of its customers with it.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial.
Waldo M. York, Judge.

The facts are stated in the opinion of the court.

Will D. Gould, for Defendant and Appellant.

James H. Blanchard, and Will D. Gould, for Intervener and Appellant.

Miller & Page, for Respondent.

SLOSS, J.—Appeals were taken to this court by the defendant and the intervener from a judgment for the plaintiff and an order denying a motion for new trial. These appeals were subsequently ordered transferred to the district court of appeal for the second appellate district for hearing and determination. The justices of that court were unable to agree, and, upon their disagreement, the cause again came to this court.

Upon the hearing in the district court of appeal the following opinion, prepared by Gray, P. J., and concurred in by Allen, J., was filed:—

“Action upon a promissory note and to foreclose a mortgage given to secure said note. After the suit was commenced the note and mortgage were regularly assigned to P. R. Moore, and the land mortgaged was conveyed to the intervener, Gould. Subsequently, Moore died, and his estate having been distributed to his widow, Rebecca W. Moore, the latter was substituted as plaintiff in the case. The judgment was for the plaintiff, and the defendant and intervener appeal from said judgment and from an order denying a new trial.

“1. Rebecca W. Moore having, by means of the assignment of the note and mortgage in suit to her husband and the subsequent decree of distribution, regularly succeeded to all the interest of plaintiff in the subject of the action, it was perfectly competent for the original plaintiff to consent to her substitution after her husband's death, and perfectly proper for her to be so substituted as a ‘successor in interest.’ (Code Civ. Proc., sec. 385.) The fact that her husband in his lifetime, and his representative after his death, had neither of them been substituted as plaintiff in no way affected her right of substitution.

“2. The principal contention of appellant is directed at the evidence, it being contended,—1. That the court should have sustained appellant's motion for a nonsuit; and 2. That the evidence shows that the note and mortgage were paid in full on the twenty-ninth day of August, 1894, by Gould, and that ever since that date Gould has been the owner thereof.

“On April 17, 1894, the note in suit, upon which there appears to have been then due \$487.29, was assigned to Doctor Moore. On the same date Gould and his wife executed

another note and mortgage on another piece of real estate for the sum of three hundred dollars. The testimony of Mr. Shankland, one of the attorneys for the original plaintiff, shows that he received Dr. Moore's check for \$487.29 on said seventeenth day of April. The transcript of Moore's account with the Farmers' and Merchants' Bank for the said month of April shows clearly, when considered with Shankland's evidence, that this check was applied as the full purchase price of the note and mortgage in suit, that day assigned to Dr. Moore; and the said amount was charged to him by the bank. The books of that same bank also show that on the same day Dr. Moore drew out of his account by means of a check the specific additional sum of three hundred dollars, and Gould's account was credited with exactly three hundred dollars that day deposited. This sum of three hundred dollars was not drawn out of Gould's account that day, but remained on deposit and was thereafter checked out by him from day to day during the month in small sums ranging from eighteen dollars to one hundred dollars. It is conceded that Dr. Moore held possession of the note and mortgage in suit from April 17th down to August 29, 1894. Gould testifies that on April 17th he paid \$187.29 on account of the note here in suit. He also testifies, and a check is introduced in evidence to show, that he paid the whole of the three-hundred-dollar note, and it is shown also, I believe, that the mortgage securing that note was satisfied of record. There is no evidence at all, however, to show that the remaining three hundred dollars left unpaid on the note in suit on April 17th was ever thereafter or theretofore paid, except the fact of the possession thereof being in Gould from and since August 29, 1894. But the testimony of Gould, fairly construed, shows that nothing was paid on the note in suit on August 29th, or thereafter. Gould's theory is, as we gather it from a careful examination of his testimony, that the note in suit was held merely as collateral security for the payment of the three hundred dollars, and that when he paid the latter note he received both notes. The final position taken by him in his testimony is to the effect that he came out of the transaction of April 17th owing nothing on account of the note in suit to anybody, but that it was on that date satisfied and extinguished in fact, but that the mortgage securing it was left unsatisfied and the note

left in the hands of Dr. Moore that it might in some way be of benefit to Gould's title to the property upon which the mortgage rested. Standing alone, the fact that the note remained in possession of Dr. Moore after the seventeenth day of April would tend strongly to show that it was not paid on April 17th. It was for the trial court to determine whether the reasons given by Gould for the note remaining in the possession of Moore after April 17th were satisfactory. Of course, it would be of no value as collateral security if it had been paid on April 17th, and the theory that any portion of it was paid on that date is rendered improbable, not only by the fact that it remained in the possession of Dr. Moore after that date, but also by the peculiar condition of the several bank accounts of Moore and Gould for that month of April. These bank accounts may have also shaken the faith of the trial court in Gould's statement that he paid the \$187.29 on the note in suit on April 17th. At the close of business on that date Gould had in the bank considerably over three hundred dollars, and the state of the account fails to disclose that he devoted any of the money he had in bank to this payment of \$187.29.

"The situation is well stated in respondent's brief as follows:—

" 'The essential question in this case is whether Paul R. Moore did or did not loan to Will D. Gould \$487.29 on the seventeenth day of April, 1894. If yes, then plaintiff should prevail on the merits. Both sides agree that on the same day Moore loaned to Gould three hundred dollars upon a note and mortgage for that amount, which was afterwards paid and the note and mortgage canceled and satisfied. Appellants claim that this was the only loan made by Dr. Moore, and, necessarily, admit that this was the only loan that was paid back to Dr. Moore. If Dr. Moore made the loan of \$487.29, he took an assignment of the note and mortgage in suit as security for it—they passed to Rebecca Moore by decree of distribution of his estate, and she is entitled to foreclose them, and finding V—which is the essential one as the record presents itself, is justified.'

"I am of opinion that the trial court was justified by the evidence in its conclusion that there were two amounts of money advanced by Dr. Moore, one of \$487.29 and the other

of three hundred dollars, and that the former of these sums had not been paid.

"It is conceded that at the time the suit was commenced the note in suit was unpaid. The intervener in his pleading assumed the burden of proving that it had been paid off and extinguished after the suit was commenced, and of course the burden was upon him to prove payment as alleged. (*Melone v. Ruffino*, 129 Cal. 514, [62 Pac. 93, 79 Am. St. Rep. 127]; *Roche v. Baldwin*, 143 Cal. 191, [76 Pac. 956].) The plaintiff had by the introduction of the assignment of the note and mortgage to Dr. Moore and of the decree of distribution to herself, made out a *prima facie* case, and the motion for a nonsuit was properly denied.

"The finding that the intervener had possession of the note by reason of his being the attorney for the parties is a finding as to an evidentiary fact and is not essential to the support of the judgment.

"The essential finding along this line is the one in which it is found that the note was not paid.

"There was no error in admitting the books of the bank in evidence. (*McLennan v. Bank of California*, 87 Cal. 569, [25 Pac. 760]; *Pauly v. Pauly*, 107 Cal. 8, [40 Pac. 29, 48 Am. St. Rep. 98].)"

After examining the record and briefs, and in the light of the oral argument made, we are entirely satisfied with the views and conclusions expressed in the foregoing opinion, and hereby adopt it as the opinion of this court.

The judgment and order are affirmed.

Shaw, J., and Angellotti, J., concurred.

Hearing in Bank denied.

[L. A. Nos. 1648, 1573. Department Two.—March 1, 1907.]

SUSAN A. McLEAN, Appellant, v. E. J. BALDWIN, Defendant and Respondent; RICHARD GARVEY et al., Defendants.

BOUNDARY—EVIDENCE—FINDINGS.—Upon a review of the evidence and findings as they appear in the case, *held*, that the so-called Seebold line should have been taken, for the purposes of this case, as the line establishing the boundary between the land of the plaintiff and defendant; and that therefore the finding that the plaintiff is not the owner of any of the premises described in the complaint is not sustained by the evidence and is contrary to the other findings.

APPEALS from a judgment of the Superior Court of Los Angeles County from an order refusing to render a different judgment and from an order refusing a new trial. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

Graves, O'Melveny & Shankland, for Appellant.

Works, Lee & Works, for Respondent.

McFARLAND, J.—This is an action to quiet title to a certain piece of land. The defendant Garvey made default, and defendant Temple disclaimed. Defendant Baldwin answered, denying that plaintiff had any title or right to the premises described in the complaint, averring his ownership thereof, setting up a certain judgment in bar of plaintiff's action, and praying for judgment decreeing that plaintiff has no title to said land, and that defendant is the owner thereof. The trial court found that plaintiff had no title or right to or in the premises, or any part thereof, and that defendant was the owner of certain land described in the judgment. There are two transcripts on appeal in the case, Nos. 1648 and 1573, and these transcripts present three appeals by plaintiff—one from the judgment, another from an order denying a motion made under section 663½ of the Code of Civil Procedure to render a different judgment, and the third from an order denying plaintiff's motion for a

new trial. They were all submitted at the same time and will be considered together.

The evidence, including testimony of witnesses, former judgments and other documents, and the findings and judgments herein, present a case which is confused, uncertain, and unsatisfactory. Indeed, it is difficult to discover what, if anything, the findings and judgment do definitely determine. It might almost be imagined that the parties and their predecessors have been trying to keep open opportunities for the luxury of future litigation.

The action is to quiet title to a small piece of land lying along the boundary lines between two large adjoining tracts of land—one known as the Rancho Potrero de Felipe Lugo, lying on the east, and the other known as the Rancho La Merced, lying on the west. In 1872 both of these ranches were owned by F. P. E. Temple, who was the common source of title of all the parties. In 1873 he gave to the son, John H. Temple, a piece of land lying along the boundary line of said ranchos, containing about seventy-five acres, and known as the John H. Temple homestead. The plaintiff in the case at bar claims through mesne conveyances from said John H. Temple—the deeds running from said Temple to one A. N. Davidson, from Davidson to E. H. Watkins, from Watkins to his wife, and from Watkins and wife to the present plaintiff.

The main question in the case is whether the land here in controversy is on the east or the west side of the boundary line between the two ranchos. Defendant contends that the boundary is a line called the “Stevenson line,” to be noticed hereafter, while plaintiff contends that the line is “the westerly boundary line of the Rancho Potrero de Felipe Lugo as said line was surveyed by L. Seebold in August, 1874.” If the Stevenson line is, for the purpose of this case, to be taken as the right line, then the judgment is correct; if the Seebold line is the right one, then the judgment is erroneous, at least as to a larger part of the land in controversy.

Defendant pleaded in bar, and mostly relies upon, a judgment rendered in the superior court in an action brought by defendant herein as plaintiff therein against the said John H. Temple, and designated in the superior court as *Baldwin v. Temple*, No. 5817. That action was brought to quiet title

to a piece of land which is described in the complaint therein as follows: "That certain tract of land bounded on the northerly side by the boundary line between the Rancho La Merced and the Rancho Potrero de Felipe Lugo, and on the westerly side by the road leading from the Old Mission San Gabriel to the schoolhouse known as the Temple schoolhouse, and on the easterly side by the San Gabriel River, and on the southerly side by the land heretofore occupied and used by one E. Bestwick, including within said boundaries ten acres of land, more or less, the same being located in the northwest corner of the said Rancho La Merced."

The defendant therein, Temple, answered denying the averments of the complaint, and also filed a cross-complaint in which he averred that he was the owner of a piece of land described as follows: "That certain tract of land situated in the township of El Monte, county of Los Angeles, state of California, and which is bounded on the northerly side by the road leading from the Old Mission San Gabriel to the schoolhouse known as the Temple schoolhouse, said road known as the Old Mission road, and on the easterly side by the western boundary of the Rancho Potrero de Felipe Lugo, said line was surveyed by L. Seebold in August, 1874; and on the southerly side by the San Gabriel River; and on the westerly side by the land heretofore occupied and used by E. Bestwick. Said tract described being a part of the John H. Temple homestead." He also averred in his cross-complaint that "said described tract is the same land described in plaintiff's complaint"; and in his answer to the cross-complaint Baldwin "admits that the land described and claimed by the plaintiff in his complaint in said action is the same land and premises described in the said cross-complaint of the defendant." That action was commenced on the fifteenth day of February, 1887, and judgment was rendered therein in favor of Baldwin on the twenty-eighth day of May, 1897. The judgment adjudicated that Baldwin was the owner and entitled to the possession of the land as described in the complaint, and also in the cross-complaint. At the time of the commencement of that action Baldwin was and had been the owner of the Rancho La Merced. At the commencement of that action he filed a *lis pendens*, which has been held to give constructive notice to and to bind the successors in

interest of said Temple, including the plaintiff herein. (See *McLean v. Baldwin*, 136 Cal. 565, [69 Pac. 259].)

Therefore the judgment in No. 5817 quieted Baldwin's title to a piece of land that was described as "bounded on the easterly side by the western boundary of the Rancho Potrero de Felipe Lugo as surveyed by L. Seebold in August, 1874." But after the entry of the judgment, which was not appealed from, Baldwin caused another line to be run by a surveyor named Stevenson—being the same hereinbefore mentioned—which was different from and easterly of the Seebold line, and which Baldwin claimed as the line between the two ranchos, and in accordance with which he was put into possession by the sheriff under a writ of possession. There was no warrant under the judgment for establishing the Stevenson line. In the case at bar the court finds the facts as to this line surveyed by Stevenson, but it is doubtful whether the findings expressly declare that the Stevenson line is the correct one, although by implication they seem to so declare, and other findings seem to assume such line as the correct one. However, the description of the land quieted to Baldwin in the case at bar adopts the descriptions in the judgment in said case No. 5817, which, of course, again describes Baldwin's land as bounded on the easterly side by "the western boundary of the Rancho Potrero de Felipe Lugo as said line was surveyed by L. Seebold in August, 1874." Defendants' counsel contend that, as the court found that plaintiff was not at the commencement of the action, "and is not now, the absolute nor exclusive owner in her own right as her separate property, nor the owner at all, of that certain property situate in the county of Los Angeles, state of California, and bounded and described in the first paragraph of her complaint, or any of said described property situated within the Rancho La Merced in said county," therefore she would not be aggrieved even though that part of the judgment which quiets certain described land to Baldwin be erroneous. But the very question whether the above finding against the plaintiff can be maintained depends upon the proper location of the disputed line between the two ranches.

Counsel for respondent seem at one place in their brief to intimate that the alleged Seebold line has no existence and is a "myth." But documentary evidence introduced at the

trial, and the testimony of witnesses, show that the Seebold line was a well-recognized line for many years. Moreover, in the case at bar the court finds that "the survey by Seebold was actually made by him on the ground in August, 1874, is the same survey referred to in the pleadings in the case No. 5817, and the Seebold line where it crossed the county road was indicated by a notch cut in the fence," and that the Stevenson line "was located upon the ground about five chains easterly from the line of the original survey by Seebold in August, 1874." There is no room therefore for ignoring the said Seebold line.

From the foregoing it seems clear that, upon the evidence and findings as they appear in the case at bar, the Seebold line should have been taken, for the purposes of this case, as the line establishing the boundary between the land of plaintiff and defendant; and that therefore the finding that the plaintiff is not the owner of any part of the premises described in the complaint is not sustained by the evidence and is contrary to the other findings. For this reason the judgment and order denying a new trial must be reversed. It may be noted that while the appeal from the judgment is expressed as an appeal from certain parts thereof, it is in substance an appeal from the whole judgment.

We cannot, upon the record as it stands, reverse the order of the court below refusing to render a new and different judgment, as set forth in transcript 5817. To do so would be for this court to make new findings. That order is therefore affirmed.

There are many things in the record which we have not noted, and which, under the above views, are not necessary to be noticed.

It is to be hoped that upon another trial the line between the parties may be definitely fixed, not merely by the name of the survey, but by an actual line traced on the ground, which will end all litigation upon the subject.

The judgment and order denying a new trial are reversed.

Henshaw, J., and Lorigan, J., concurred.

[L. A. No. 1735. Department Two.—March 7, 1907.]

ROBERT S. CARTER, Respondent, v. KITTURIA B. OSBORN, Appellant.

TAXATION—DEED TO STATE—RECITALS—EXPIRATION OF TIME FOR REDEMPTION.—A defect in a tax-deed to the state executed July 6, 1900, for land sold to it for delinquent taxes assessed for the year 1894, in failing to recite the time when the right of redemption had expired, was cured by the act of February 28, 1903, the purpose of which was to confirm, validate, and legalize certain tax-deeds. Such act is constitutional and valid.

ID.—ASSESSMENT OF PROPERTY SOLD TO STATE.—A tax-sale to the state is not rendered void by reason of the fact that on the assessment-roll for the next ensuing year there was stamped the words "Sold to state," without a statement that it was "sold for taxes" and the date of the sale.

ID.—CERTIFICATE OF SALE—REPEAL OF SECTIONS 3776 AND 3777 OF POLITICAL CODE.—Sections 3776 and 3777 of the Political Code, which provided for the issuance of a certificate upon the sale to the state for delinquent taxes, having been repealed by the act of 1895 (Stats. 1895, p. 19), the attempt afterwards to amend the repealed sections by the Statutes of 1895, page 327, was of no effect. And a certificate, issued after the repeal of said sections, for delinquent taxes for the year 1894, will be disregarded in determining the validity of the sale.

ID.—DELINQUENT TAX-LIST—OMISSION OF DOLLAR-MARK.—In the delinquent tax-list, immediately under the heading "amount," were the figures "4 00,"—there being a space between the figure 4 and the two ciphers, as usually appears when they are intended to mean "dollars," but there was no dollar-mark. *Held*, that the delinquent list clearly indicated that dollars were meant, and that the absence of the dollar-mark did not invalidate the assessment or the tax-sale.

APPEAL from a judgment of the Superior Court of Los Angeles County. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

P. B. Lhoyd, for Appellant.

O. B. Carter, for Respondent.

McFARLAND, J.—This is an action to quiet plaintiff's title to a piece of land in the city of Los Angeles, county of

Los Angeles, described as "lot fifty-four (54) of the Wiesen-danger tract as per map recorded in book 9, page 68, miscellaneous records of said county." Judgment went for plaintiff, and from this judgment defendant appeals.

The plaintiff had the legal title to the lot in question, the same having been conveyed to him on February 3, 1904, by one Berger Kallander, who then owned it, unless such title passed from said Kallander and vested in defendant by virtue of certain tax proceedings and deeds. The defendant claims title through an assessment for the year 1894, a tax-deed to the state executed July 6, 1900, and a deed to defendant from the state. The court made only two findings of ultimate facts, —namely, that plaintiff "is the owner" of the land in question, and that defendant has "no right, title or interest therein." However, the bill of exceptions and the points of counsel show upon what theory the case was tried. That theory was that the tax proceedings and deeds were for various reasons void and conveyed no title. Objections to the introduction of the tax-deed to the state were sustained, the main objection being that the "deed does not recite the time when the right of redemption had expired." Various objections were also sustained to other documents and to the assessment for 1894. But nearly all these points were decided against the contention of respondent and adversely to the rulings of the court in the recent case of *Baird v. Monroe*, L. A. No. 1623, *ante*, p. 560, [89 Pac. 352], the opinion in which was filed February 16, 1907. It was there held that the alleged defect in the tax-deed to the state was cured by the act of the legislature approved February 28, 1903, [Stats. 1903, p. 63,] the purpose of which act was to "confirm, validate, and legalize" certain tax-deeds. In the case at bar respondent contends, and the court must have found, that said act was unconstitutional; but the question was elaborately discussed in *Baird v. Monroe*, and the act held to be constitutional and valid. It was there also held that the objections made in the case at bar to the said assessment are not well taken. Indeed, nearly all the points made by the respondent in the case at bar, and sustained by the court, were decided in *Baird v. Monroe* adversely to respondent's contention, and it would be useless to restate here the reasoning of the exhaustive opinion delivered in that case; it is sufficient to refer to it as determinative of those points.

One or two points are made in the case at bar which perhaps were not covered in the Baird case, and they will be here noticed.

It is contended that the tax-sale was void because on the assessment-roll for the next ensuing year, 1895, there was stamped the words "Sold to state," without a statement that it was "sold for taxes," and the date of the sale. We think, however, that the words used sufficiently comply with the statute, and fully answer the purpose of giving notice to the owner of the fact of such sale.

A certificate of sale was introduced, and it is objected that while the total amount of the tax is correctly given at \$3.10, yet the items given amount to only \$2.43, which, with a penalty of ninety cents, makes only \$3.33, instead of \$4.00, for which it was sold. The assessment showed the total amount of tax to be the \$3.10, which, with the ninety cents penalty, makes \$4.00. We do not deem it necessary to consider whether this slight mistake in the computation would, in any event, affect the validity of the sale, which was made for the correct amount, because we are of the opinion that the certificate may be disregarded, for the reason that at the time of the sale sections 3776 and 3777 of the Political Code, which provide for such certificate, had been repealed (Stats. 1895, p. 19), and the attempt afterwards to amend the repealed sections (Stats. 1895, pp. 327, 328) was of no effect. (Pol. Code, sec. 330; *Fletcher v. Prather*, 102 Cal. 418, [36 Pac. 658].)

It is contended that the tax-sale was void because in the delinquent list the amount due was not stated. There is in said list the word "amount," and immediately under it are the figures "4 00"—there being a space between the figure 4 and the two ciphers as they usually appear when they are intended to mean "dollars"; but there is no dollar-mark. For this contention respondent relies on certain early California cases—*Hurlbutt v. Butenop*, 27 Cal. 50; *Braly v. Seaman*, 30 Cal. 610; *People v. San Francisco Sav. Union*, 31 Cal. 132; *People v. Hastings*, 34 Cal. 571; and also the later case of *Emeric v. Alvarado*, 90 Cal. 444, [27 Pac. 356], which merely refers approvingly to the said early cases. In those cases it does not clearly appear how the figures intended to represent dollars were written, although it does appear that there were

no dollar-marks, and we will assume that if they had been exactly as those in the delinquent list in the case at bar the rulings would have been the same. But in all those cases the defect was in the *assessment itself*, not in any subsequent document, as, for instance, the delinquent list. In *People v. San Francisco Sav. Union*, 31 Cal. 132, it was contended that the omission by the assessor to make a valuation of assessed property might be amended by the auditor by prefixing the dollar-mark to the figures; but the court said that the assessment-roll "is the basis of all subsequent proceedings"; that under the constitution the assessor must fix the valuation of property which is to be taxed, and that the "valuation is the very foundation of proceedings for enforcing and collecting the tax upon property" and "is essential to the validity of a property tax." Indeed, the assessment is very much in the nature of a judgment, and must therefore be in every way definite and precise, and the court in the case just quoted from illustrates its meaning by supposing a judgment which merely awarded to a party certain naked figures without any designation of what they represented. But we do not think that this stringent rule as to the original assessment, which is the foundation and source of the asserted tax, is applicable to all subsequent proceedings. The delinquent list in the case at bar, with the word "amount" and under it "4 00," clearly gave notice to any intelligent person that dollars were meant, and the absence of the dollar-mark does not invalidate the assessment or the tax-sale.

There are no other points calling for special notice.

The judgment appealed from is reversed and the cause is remanded for a new trial, to be conducted in accordance with the views expressed in this opinion and in the opinion in the said case of *Baird v. Monroe*, ante, p. 560, [89 Pac. 352].

Lorigan, J., and Henshaw, J., concurred.

[L. A. No. 1711. Department One.—March 7, 1907.]

**A. B. WILLIAMS, Appellant, v. SOUTHERN PACIFIC
RAILROAD COMPANY, Respondent.**

TRESPASS—STATUTE OF LIMITATIONS.—Under subdivision 2 of section 338 of the Code of Civil Procedure, an action for trespass upon real property must be commenced within three years after the accruing of the cause of action.

ID.—AMENDED COMPLAINT—DEMURRER—APPEAL.—Where an amended complaint is filed after the cause of action has become barred by the statute of limitations, and a demurrer thereto is sustained on that ground, and judgment rendered for the defendant, the appellant who alleges error on the ground that the original complaint was filed before the cause of action had become barred must make that fact appear by the record.

ID.—DAMAGES FOR PERMANENT TRESPASS—ACCRUAL OF CAUSE OF ACTION.—Where an injury or trespass to land is of a permanent nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the injury is inflicted or the trespass committed, and an action therefor must be commenced within the statutory period after the doing of the wrongful act.

ID.—UNLAWFUL CONSTRUCTION OF RAILROAD—INJUNCTION.—An action to recover damages for a wrongful entry by a railroad company upon the land of the plaintiff and the construction of its railroad thereupon, without proceedings for condemnation, and without plaintiff's consent, is barred if not commenced within three years after the entry; and the right to equitable relief by injunction against the continuance of the railroad is likewise barred at the same time.

APPEAL from a judgment of the Superior Court of Santa Barbara County. J. W. Taggart, Judge.

The facts are stated in the opinion of the court.

C. A. Storke, for Appellant.

Henley C. Booth, for Respondent.

SLOSS, J.—A demurrer to an amended complaint was sustained, and on plaintiff's declining to amend judgment was entered in favor of the defendant. From this judgment the plaintiff appeals.

The amended complaint was filed on March 23, 1904. It alleged that plaintiff was the owner of a parcel of land in the town of Lompoc, extending along and to the center line of Laurel Avenue, a public highway; that on January 1, 1900, while plaintiff's predecessor in interest was the owner of the property, the defendant, a railroad corporation, without the consent of the owner, and without any condemnation proceedings, had entered upon the part of said land within Laurel Avenue, and laid a railroad track thereon; that ever since said last-named date the defendant had operated its railroad over said track, and occupied said lands within the lines of the street, to the exclusion of the plaintiff, thereby obstructing said street, and depriving the plaintiff of access and approach to the street, and diminishing the value of his premises in the sum of six hundred dollars. The prayer was for judgment for six hundred dollars damages, "or that the defendant be permanently enjoined from operating said railroad along said street."

The demurrer was based on various grounds, but it will not be necessary to consider any but those setting up the bar of the statute of limitations. The principal provisions pleaded in the demurrer were sections 335, 338, subdivision 2, and 339, subdivision 1, of the Code of Civil Procedure.

The complaint alleges a trespass upon plaintiff's land. Under subdivision 2 of section 338 an action for trespass upon real property must be commenced within three years after the accruing of the cause of action. If the cause of action here sued upon accrued at the date of defendant's entry, it would seem to fall within the purview of this statute, since more than four years have elapsed between the date of such entry and the filing of the amended complaint. (The record as presented does not contain the original complaint, nor show the date of its filing. If such original complaint was filed within the three years, it was incumbent upon the appellant, who alleges error, to make that fact appear.)

The appellant seeks to avoid the bar of the statute by the contention that, since the injury complained of (viewing it either as a mere trespass, or as a trespass constituting a nuisance) was in its nature continuing, a new cause of action arose at each moment of its continuance, and that successive actions might be brought, in each of which the plaintiff might

recover damages accruing up to the time of the commencement of the action. This rule is properly applicable in cases where the injury or trespass is temporary in character, since in such cases it is not presumed that the wrongful conduct will be continued. The plaintiff, in such cases, can recover only the damages which have accrued up to the institution of the action. (8 Am. & Eng. Ency. of Law, 2d ed., p. 684.) It follows that an action may be brought at any time to recover the damages which have accrued within the statutory period, although the original trespass occurred before that period, provided that the plaintiff has not permitted such time to elapse as will vest in the defendant a right by prescription.

On the other hand, where the injury or trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the injury is inflicted or the trespass committed. (8 Am. & Eng. Ency. of Law, 2d ed., p. 684.) As this court said in *Beronio v. Southern Pacific Co.*, 86 Cal. 415, 24 Pac. 1093, 21 Am. St. Rep. 57], "Whenever by one act a permanent injury is done, the damages are assessed once for all." (Civ. Code, sec. 3283.) The action must consequently be commenced within the statutory period after the doing of the wrongful act. (*Indianapolis etc. R. R. Co. v. Eberle*, 110 Ind. 542, [59 Am. Rep. 225, 11 N. E. 467]; *Stricker v. Midland R. R. Co.*, 125 Ind. 412, [25 N. E. 455]; *Stodgill v. Chicago, B. and Q. R. R. Co.*, 53 Iowa, 341, [5 N. W. 495]; *Powers v. Council Bluffs*, 45 Iowa, 652, [24 Am. Rep. 792]; *Town of Troy v. Cheshire R. R. Co.*, 23 N. H. 83, [55 Am. Dec. 177]; *Conlon v. McGraw*, 66 Mich. 194, [33 N. W. 388]. See, also, *Daneri v. Southern California Ry. Co.*, 122 Cal. 507, [55 Pac. 243].)

The injury complained of in this instance is the construction and operation of a steam railroad. The great weight of authority is to the effect that such an act is permanent in its nature, and an action to recover damages for the injury inflicted thereby must be commenced within the statutory period after the original infliction of the injury. (*Frankle v. Jackson*, 30 Fed. 398; *City of Denver v. Bayer*, 7 Colo. 113, [2 Pac. 6]; *Railroad Co. v. Lowe*, 118 Ill. 203, [59 Am. Rep. 341, n, 8 N. E. 460]; *Doane v. Railway Co.*, 165 Ill.

510, [56 Am. St. Rep. 265, 46 N. E. 520]; *Rosenthal v. Railway Co.*, 79 Tex. 325, [15 S. W. 268]; *Highland Ave. etc. Ry. Co. v. Matthews*, 10 South. 267; *Jacksonville Ry. Co. v. Lockwood*, 33 Fla. 573, [15 South. 327]; *Railway Co. v. O'Neill*, 58 Neb. 239, [78 N. W. 521]; *Stricker v. Midland Ry. Co.*, 125 Ind. 412, [25 N. E. 455]; *Stodgill v. Chicago, B. and Q. R. R. Co.*, 53 Iowa, 341, [5 N. W. 495]; *Town of Troy v. Cheshire R. R. Co.*, 23 N. H. 83, [55 Am. Dec. 177].) In *Robinson v. Southern California Ry. Co.*, 129 Cal. 8, [61 Pac. 947], it was held that an action to recover damages for a wrongful entry by a railroad company upon the land of plaintiff, and the construction of its railroad thereupon, without proceedings for condemnation, and without plaintiff's consent, is barred if not commenced within three years after the road was built and operated.

Upon the principle declared in these cases, which we think to be sound, the demurrer was properly sustained. It is true that there are authorities laying down a contrary rule. Prominent among them is a line of New York cases, of which *Uline v. Railroad Co.*, 101 N. Y. 98, [54 Am. Rep. 661, 4 N. E. 536], and *Galway v. Railroad Co.*, 128 N. Y. 132, [28 N. E. 479], are examples. These cases rest upon the proposition that "no action at law can be maintained by an owner to recover prospective damages for injuries inflicted upon real property," a proposition which is not in accord with the law of this state where the injury complained of is permanent in character. (Civ. Code, sec. 3283; *Beronio v. Southern Pacific Co.*, 86 Cal. 45, [21 Am. St. Rep. 57, 24 Pac. 1093].) The rule of these New York cases, says the supreme court of the United States, "has not prevailed in analogous cases decided in other jurisdictions." (*New York etc. R. R. Co. v. Fifth National Bank*, 135 U. S. 433, [10 Sup. Ct. 743].) The cases of *Hopkins v. Western Pacific R. R. Co.*, 50 Cal. 190, and *Ford v. Santa Cruz R. R. Co.*, 59 Cal. 290, also seem to decide that in a case of this character only the damages accruing up to the time of the commencement of the action can be recovered. While these cases have not been in terms overruled, the later decisions above referred to are inconsistent with them, and they cannot be regarded as declaring the law of this state in the particular under discussion.

It may be remarked that the plaintiff himself regarded and treated the injury here alleged as permanent in character. This is shown by the allegation that the acts of the defendant have diminished the value of plaintiff's premises in the sum of six hundred dollars, the amount sought to be recovered. This was evidently intended to show a permanent injury to the land, and not merely damage sustained up to the time of the filing of the complaint.

The fact that an injunction is sought as an alternative to the prayer for damages does not affect the conclusions above reached. The provisions of our code relative to limitation of actions make no distinction between equitable and legal proceedings. (*Boyd v. Blankman*, 29 Cal. 19, 44, [87 Am. Dec. 146].) Under our system there is but one "form of civil action." (Code Civ. Proc., sec. 307; *Luz v. Haggin*, 69 Cal. 255, [10 Pac. 674].) The sections providing periods of limitation refer to actions for the enforcement of various rights, and are to be applied "so as to make the right sought to be enforced, and not a form of procedure, the test as to whether or not the statute applies." (*Redwood County v. W. W. and St. P. L. Co.*, 40 Minn. 512, [41 N. W. 465, 42 N. W. 473]; *Bristol v. Washington County*, 177 U. S. 133, [20 Sup. Ct. 585].) "The nature of the cause of action, and not the form of the action, determines the applicability of the statute of limitations." (*Miller & Luz v. Batz*, 131 Cal. 402, [63 Pac. 680]; *Murphy v. Crowley*, 140 Cal. 141, [73 Pac. 820].) No doubt the prayer of a complaint will in many cases be of assistance in ascertaining the nature of the cause of action relied on, and, accordingly, in determining the section of the statute of limitations which may be applicable. But it is not contended here that the prayer for injunction has the effect of changing the cause of action from one for trespass upon real property to one governed by some other period of limitation. It still remains an action for trespass upon real property, and in such action the right to relief, whether legal or equitable, is barred in three years.

The judgment is affirmed.

Shaw, J., and Angellotti, J., concurred.

[L. A. No. 1492. Department Two.—March 8, 1907.]

W. P. REYNOLDS, Appellant, v. PENNSYLVANIA OIL COMPANY, Respondent.

BANKRUPTCY—ADJUDICATION DOES NOT STAY APPEAL IN STATE COURTS.

—The mere filing in the appellate court of a certified copy of an order made by the United States district court adjudging the respondent a bankrupt, which order was made subsequent to the taking of the appeal, does not deprive the appellate court of the power of deciding the appeal on the merits.

DEBTOR AND CREDITOR—COMPOSITION AGREEMENT—CONTRACT.—The contract set forth in the opinion, *held*, not to be a composition agreement, and not to be a bar to the plaintiff's cause of action.

PLEADING—CONTRACT PLEADED IN ANSWER—ADMISSION OF DUE EXECUTION.—Where a written contract, purporting to have been signed by an attorney in fact, is set up in the answer as a defense to the action, and the plaintiff does not within ten days after receiving a copy of the answer file an affidavit denying the due execution of the contract, as required by section 448 of the Code of Civil Procedure, the genuineness and due execution of the contract are admitted, and the plaintiff cannot on the trial introduce evidence of a want of authority of the attorney to sign the name of his principal.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

George A. Corbin, for Appellant.

Tanner, Taft & Odell, for Respondent.

THE COURT.—This cause was certified to this court upon the disagreement of the justices of the district court of appeal of the second district. While the action was pending before that court the following opinion was prepared by Judge York, justice *pro tem.*, called in for the purpose of the hearing and decision of this case. That opinion is hereby adopted as the opinion of this court, and its completeness renders unnecessary any further elaboration of the questions presented.

"This action was prosecuted by plaintiff and appellant to obtain a judgment against defendant and respondent upon a claim assigned to appellant by A. M. Cates for services as an attorney and counselor at law, and upon a promissory note made by respondent in favor of Mrs. M. B. Dorland and indorsed and assigned to appellant. The respondent has filed in this court a certified copy of an order made by the United States district court adjudging respondent a bankrupt, which order was made subsequent to the appeal in this case. The respondent has not presented the bankruptcy proceedings to this court in any other form except by a notice that it would move to dismiss this appeal by reason of said adjudication in bankruptcy. In the absence of any appearance to make the motion noticed, we assume respondent's position to be that the adjudication of respondent's bankruptcy deprives this court of jurisdiction to proceed against it. Section 11 of the Bankruptcy Statute provides for a stay of proceedings on the filing of a petition in bankruptcy against a party until after an adjudication or the dismissal of the petition, and that 'if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication'; and also that 'the court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.'

"The utmost, therefore, that can be contended for in behalf of the respondent is that it is discretionary with the bankruptcy court to order the parties to this action to suspend proceedings, or order the trustee to enter his appearance and defend the action on behalf of the creditors of the bankrupt.

"In Collier on Bankruptcy the author says: 'It is in no sense the duty of the state court to stay merely because it hears of the bankruptcy of a suitor. It must be informed of the fact by proper pleadings' (p. 128). 'Save in the interval between the filing of the petition and the adjudication, a stay is always discretionary' (p. 129). 'A court of bankruptcy may but need not order the trustee to intervene in a suit against a bankrupt. The state court cannot, on the other hand, compel him to intervene' (p. 131).

"'When the right of the state court is to be questioned, it can be done by the intervention of the trustee only.' (Brandenburgh on Bankruptcy, sec. 251.)

"It follows that the proposition that this court must in this case take judicial notice of the bankruptcy proceedings on a showing of their pendency only, and suspend proceedings in this cause, finds no support in reason or justice. (*Metcalf v. Barker*, 187 U. S. 165, [23 Sup. Ct. 67, 9 Am. Bankr. Rep. 37]; *Pickens v. Roy*, 181 U. S. 177, [23 Sup. Ct. 78, 9 Am. Bankr. Rep. 47]. See, also, *Brandenburgh on Bankruptcy*, secs. 276, 277, 282.)

"We therefore conclude that respondent's having been adjudicated a bankrupt is not in the way of a decision of this appeal on the merits.

"The sole defense to this action urged by respondent is a certain agreement, as follows:—

" 'This agreement, made on the twenty-fifth day of January, 1902, between the Pennsylvania Oil Co., an incorporation, and the undersigned creditors of said corporation, witnesseth:

" 'That it is hereby agreed between said company and its said creditors, that the company will forthwith deliver into the possession of three trustees, representing said creditors, viz.: A. J. Munn, Corry B. White and S. T. Peet, its plant, wells, tanks, pipes, pipe-lines, franchises and all personal property and equities, oil on hand, books and accounts, and contracts, to be by said trustees administered for the mutual benefit of all parties hereto, and particularly for the payment of the debts of the corporation hereinafter enumerated, upon terms and conditions here following, to wit:

" 'Said trustees shall execute their said trust without compensation for their said services. They shall proceed in a proper manner to operate the pumping plant and take the products of the wells, being empowered to employ for such purposes all necessary help, and they shall carry out all existing contracts now binding upon said corporation, for the sale of products, operation of the plant, *et cetera*, and from the proceeds they shall:

" 'First. Pay all operating expenses, including help bills, necessary repairs and current obligations, inclusive of interest upon notes or other evidences of indebtedness, and all proper and necessary expenses for executing said trust, and also any and all claims not herein represented, which may become, or, in the judgment of the trustees are liable to become, liens upon the property of said company.

“ ‘Second. They shall, from the net proceeds of such operation, make the following payments:

“ ‘A. The note due Emma A. Summers, February 5th, 1902, for \$1200.00 and interest in full.

“ ‘B. The following claims, which, for the purposes of this agreement are hereby established as preferred, upon which payments shall be made as often as funds on hand will warrant, *pro rata* (provided, that if the claim of the Crane Company for \$818.90, interest and costs, shall, or is liable to become a special lien against the property of the company, or collectible out of the bond given in the proceedings heretofore instituted by said company in the superior court, then the trustees may, before paying anything upon the other preferred claims, discharge said obligation to said Crane Company in full: [Here follows a list of said claims, stating the names of the claimants and the amounts due each, including Crane Company, \$818.90.]

“ ‘C. After the payment of said preferred claims, said trustees shall, in like manner, pay the following claims: [Here follows a list of said last-mentioned claims, stating the names of the claimants and the amount due each, including appellant's assignors, viz.: “Mrs. M. B. Dorland, 300.00; A. M. Cates, 362.25.”]

“ ‘Said trustees are hereby authorized to pay interest upon all of the above claims, which are in the form of accounts stated, at the rate of 8 per cent per annum, from the day when the same become due.

“ ‘And it is further agreed and understood that the foregoing marshaling of claims, both preferred and otherwise, is solely for the purposes of this agreement, and that in case the trustees shall, for any reason, fail to administer said trust to its contemplated conclusion, then each and every of said claims, or what may remain unpaid of any of them, shall be restored to the legal *status* it occupied prior to the execution of this agreement.

“ ‘It is further agreed and understood that the statement of the amounts of all the foregoing claims is subject to correction, and no such correction shall in any way invalidate the force and validity of this agreement as to any creditor.

“ ‘And the undersigned, A. J. Munn, hereby agrees that as long as this trust is administered by said trustees at a net

profit from the business of not less than \$500.00 per month, he will extend the time of payment upon the principal of his admitted claim of \$2000.00, which is not included in the above composition.

“And it is agreed that this contract shall remain in full force and effect until all of said claims are fully paid; provided, that said corporation may, at any time, repossess itself of whatever property and rights which may be in the hands of said trustees, upon payment to them of an amount sufficient to discharge what then remains due upon the claims intended to be paid under this trust.

“And said trustees will, when they have fully performed the duties cast upon them hereunder, and have made full payment of the amounts as hereinbefore set forth, deliver to said company, its successors or assigns, all of the property, rights and equities whatever at that time in their possession.

“In case of the death, disability, or resignation of any trustee hereunder, the remaining trustees shall select his successor from among the creditors enumerated herein.

“It is further expressly understood and agreed by and between the parties hereto, that in no case shall this trust endure for a longer time than the lives of the natural persons in being, parties hereto, or the survivors of them.

“In witness whereof, said corporation has, by resolution duly adopted by its board of directors, and entered in its minutes, authorized the execution of this agreement by its vice-president and secretary, and attested by its seal.

“PENNSYLVANIA OIL COMPANY,

“By Geo. T. Gillette, Vice-President;
and C. C. Harris, Secretary.

“(Seal of the Pennsylvania Oil Company—Incorporated. 1900.)

“And the creditors above enumerated have set their hands the day and date first in this agreement written; this agreement being executed in duplicate. [Here follow the names of the creditors whose names appear in the contract, including signatures as follows: “Mrs. M. B. Dorland, by A. M. Cates, her attorney”; “A. M. Cates.”]

“We, the undersigned, hereby accept the above trust on February 1st, 1902.

“A. J. MUNN, C. B. WHITE, S. T. PEET.”

"Defendant had judgment in the superior court. The appeal is from the judgment and an order denying plaintiff's motion for a new trial.

"Appellant contends that said contract is not a bar to his prosecution of this action. The contract does not purport to transfer all respondent's property to its trustees for its creditors. For aught that appears in the contract, it might have had ample property for the payment of all its debts. Neither does the contract purport to have been signed by all its creditors. It does not provide for any time within which payments may be made upon claims of the class of appellant's, and yet it provides that the contract shall remain in force and effect until all of said claims are fully paid. For aught that appears in the contract, nothing might be received by the trustees in excess of operating expenses. There is nothing whatever in the contract providing that the creditors who have signed it shall be debarred from prosecuting actions upon their respective claims. There is no covenant on the part of the creditors to discharge their claims against the debtor on the payment of less than the full amount of their claims. As a composition agreement it lacks essential covenants.

"In *Pierson v. McCahill*, 21 Cal. 123, the contract which was set out in full in the opinion of the court is more definite and certain than the contract under review in this case. In that case there was an assignment of the debtor's stock of goods and his accounts and notes and a covenant that when the creditors should have received fifty cents on each dollar of the indebtedness he should be replaced in possession of the remaining stock. But it was not deemed sufficient without reformation, to bar an action by one of the creditors who had signed the agreement. In speaking of a composition agreement in *Kullman v. Greenebaum*, 92 Cal. 403, [27 Am. St. Rep. 150, 28 Pac. 674], the court, quoting approvingly from *Solinger v. Earle*, 82 N. Y. 393, says: 'A composition agreement is an agreement as well between the creditors themselves as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt.' In *Wilson v. Samuels*, 100 Cal. 514, [35 Pac. 148], a composition agreement between debtor and creditors is defined as 'an agreement made upon a sufficient consideration between an insolvent or embarrassed debtor and his cred-

itors, or a considerable proportion of them, whereby the latter, for the sake of immediate or sooner payment, agree to accept a dividend less than the whole amount of their claims, to be distributed *pro rata*, in discharge and satisfaction of the whole.'

"The only clause that respondent could contend would have the effect of barring plaintiff's cause of action is that wherein it is stipulated that 'the foregoing marshaling of claims, both preferred and otherwise, is solely for the purposes of this agreement, and in case the trustees shall for any reason fail to administer said trust to its contemplated conclusion, then each and every of said claims, or what shall remain unpaid of any of them, shall be restored to the legal *status* it occupied prior to the execution of this agreement.' Considering the whole contract so as to give effect to every part, if reasonably practicable, there is only an inference that the contract wrought a change in appellant's '*status*.' A *status*, as applied to a claim such as those upon which this action was brought, can mean nothing more than its standing, state, or condition. (Anderson's Dictionary of Law, 968.) There was a change in the *status* of appellant's claim in this: His assignors having assented to the transfer of certain of respondent's property to trustees for respondent's creditors, and having joined with respondent's creditors in that contract, one of the terms of which was that certain claims were to be paid in the execution of that trust in preference to the claims of appellant's assignors, their right to proceed against that property was lost or suspended. A restoration of that *status*, therefore, would have the effect of enabling appellant's assignors or appellant to cause the property so transferred to trustees to be levied upon to secure said indebtedness. We, therefore, hold that said contract was not a bar to plaintiff's action.

"The signature of Mrs. M. B. Dorland to said contract, signed 'M. B. Dorland, by A. M. Cates, her attorney,' was called in question on the trial of the case, and A. M. Cates testified with regard to his authority to sign the name of Mrs. M. B. Dorland, wherein it appears that said Cates was not authorized to sign Mrs. Dorland's name to said contract. The court, on motion, struck out this testimony, presumably on the ground that the plaintiff did not, within ten days after

receiving a copy of respondent's answer, file an affidavit denying the due execution of the contract, as required by section 448 of the Code of Civil Procedure. We think that the action of the court was correct. This was substantially decided in the case of *Knight v. Whitmore*, 125 Cal. 198, [57 Pac. 891]. In that case the defendant had set out in her defense an agreement in writing, signed 'Knight, Simpson & Harpham, by C. M. Simpson.' The execution of the agreement was not denied by affidavit, as provided in said section, and it was held that the genuineness and due execution of the instrument should have been deemed to have been admitted for all the purposes of the trial. It was claimed by the plaintiffs on the trial that the firm of Knight, Simpson & Harpham had been dissolved prior to the signing of said instrument, and that said Simpson had no authority to bind the plaintiffs by the contract he entered into with defendant in behalf of plaintiffs. It was held that plaintiffs, by their failure to deny by affidavit within ten days the due execution of the contract signed as above stated, admitted the genuineness and due execution of the contract; that such admission carried with it the genuineness of the signatures and the fact of its execution, and also, necessarily, the further fact that Simpson had authority to sign the names of the plaintiffs to the document. On this point we fail to see any distinction in principle between the case at bar and the case last above cited; and on the authority of that case we hold that the trial court did not err in striking out the evidence of Cates with regard to his authority to sign Mrs. Dorland's name to the contract above set forth.

"It follows, however, from our interpretation of the contract, that the court erred in rendering judgment in favor of the defendant in said action."

It is, therefore, ordered that the judgment and order appealed from be reversed.

[L. A. No. 1709. Department Two.—March 8, 1907.]

SAN DIEGO REALTY COMPANY, Respondent, v. A. F.
CORNELL, et al., Appellants.

TAXATION—VOID DESCRIPTION OF LAND—DEED TO STATE—CLOUD ON TITLE—INJUNCTION.—A description of land in an assessment-roll, as follows: "In the county of San Diego, state of California, . . . lot 1, block 17, Ocean Beach," is insufficient, and renders the assessment void; and an injunction will lie to restrain the county officers from executing a deed to the state for unpaid taxes based upon such assessment, by a description legally sufficient to charge the property, as such a deed, with the presumptions that it carries with it of the *prima facie* regularity of antecedent proceedings, would cast a cloud upon the title to the property, and result in injury to the owner.

ID.—PAYMENT OF TAXES AS CONDITION TO INJUNCTION.—Conceding such assessment to be void, and that nothing was due for taxes under it, the fact that the court, as a condition to the granting of the injunction, required the plaintiff to pay an amount found to be the just and legal amount for which the property could have been taxed, was without prejudice to the defendants.

ID.—POWER OF COURT TO DETERMINE AMOUNT OF TAXES.—Where the amount of taxes, the value of the property, the tax-rate, and the amount due, had all been fixed by the proper fiscal officers, the court had power by its decree to determine that the amount so fixed was the just and legal amount of taxes due on the property, and to order its payment to the tax-collector as a condition to the granting of the injunction. If there could be any question of the general powers of a court of equity to render such a decree, there can be none as to its power in this state, under section 187 of the Code of Civil Procedure, which provides that whenever jurisdiction over any matter is conferred, all means necessary to carry the jurisdiction into effect are conferred with it.

APPEAL from a judgment of the Superior Court of San Diego County. E. S. Torrence, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, George A. Sturtevant, Deputy Attorney-General, and Cassius Carter, District Attorney, for Appellants.

Smith & Collier, for Respondent.

HENSHAW, J.—Plaintiff brought this action against the defendants, who are county officers of San Diego County, for the purpose of enjoining them as county officers from issuing tax-deeds to certain of its property, following assessment and sale. Plaintiff alleges that the assessment was void, and avers that the defendants propose to execute the tax-deed to the state of California, conveying its land so attempted to be assessed by the void assessment; that the deed so made will cast a cloud upon plaintiff's title; that had the property been assessed according to law, the taxes assessed against it would have amounted to the sum of \$2.08 for all the years wherein the property was not legally assessed and for which taxes were not paid and for which the property could now be reassessed. Plaintiff has tendered this sum of \$2.08 to the proper officers, who have refused to accept it. It continues its offer to pay this money, and upon payment asks the decree of the court restraining the officers from clouding the title to its realty.

The court found in accordance with the complaint, accepted the tender directing payment of the money to the county treasury, and granted the injunction sought. Defendants appeal.

The description given in the assessment-roll which is attacked is as follows: "In the county of San Diego, state of California, and described thus: Lot 1, Block 17, Ocean Beach." This description is admitted by appellants to be void, upon the authority of *Labs v. Cooper*, 107 Cal. 656, [40 Pac. 1042], and *Miller v. Williams*, 135 Cal. 183, [67 Pac. 788], but appellants argue that as the assessment is void, no cloud is cast upon the title, and that there is therefore no occasion for the interposition of equity. The answer to this is found in the allegations of the complaint, that the defendants propose to execute a deed to the state by a description legally sufficient to charge the property, and by this, together with all the presumptions which follow such a deed, with the *prima facie* regularity of antecedent proceedings which it carries with it, a cloud will be cast upon the property and injury to the plaintiff thus result.

The second proposition advanced by appellant is that the court was without jurisdiction to find and declare that the sum of \$2.08 was the just and legal amount for which the

property could have been taxed and to direct the reception of this sum by the tax-collector. It is said if the assessment complained of was merely irregular it might be conceded that under appropriate allegations tendering a payment of what in equity and good conscience should be paid a court of equity might have rendered assistance (*Easterbrook v. O'Brien*, 98 Cal. 673, [33 Pac. 765]; *Ellis v. Witmer*, 134 Cal. 253, [66 Pac. 301]), but that because plaintiff contends and proves that the assessment is void, then and therefore nothing was due, nothing need be tendered, and the tender, if made, was but an idle act. But this contention, even if upheld, cannot avail appellants. The fact that a litigant going into equity offers to do more than equity has never been held a ground for refusing him the relief to which he is entitled. If a tender and payment were unnecessary, it scarcely lies in appellants' mouths to complain that their adversary has been decreed to pay that which in equity he was not called upon to pay. Still further, their counsel, who takes this position in this case, successfully contended for the opposite in *Couts v. Cornell*, 147 Cal. 560, [109 Am. St. Rep. 168, 82 Pac. 194]. The gravamen of his attack in the *Couts* case—an action in character precisely like the one here under consideration, and based upon assessments void for the same defect which vitiates this one—was that the plaintiff did not make tender of the amount equitably due, and this court held that relief would not be granted in the absence of such tender; that there was distinctly a moral obligation to pay, as well as a quasi-legal obligation, which latter the state could easily cast into the form of a strictly legal obligation by authorizing an amendment to the assessment or by reassessing.

A further contention of the appellants is that the action of the court in finding and declaring the amount due for taxes and its recordance and acceptance of the tender which had been made, with directions that the money should be received and deposited in the county treasury on account of the taxes upon the property, was a judicial usurpation of a function of government, which function is vested in the legislature alone; that it was an attempt by the court to impose taxes and to regulate their collection. This difficulty is purely imaginary. Of course, if it had become necessary for the court, in determining the amount due from plaintiff, to value the prop-

erty, to make an assessment, or to fix a rate, no court for a moment would undertake to perform these purely legislative duties. But in every case where a court without usurpation of the functions of the fiscal department can determine the amount due from a plaintiff in equity it will fix that amount and decree its payment. Here there was no question of the court being called upon to exercise the machinery of the taxing power in levying taxes. All that had been done by proper authority. The amount of taxes, the value of the property, the tax-rate, and the amount due had all been fixed. In effect, all that the court was required to decide was whether the penalties and impositions for delinquency were justly chargeable against the property where the assessment was void. It held, and properly held, that they were not, but decreed that the sum which the state had fixed as due for taxes should be paid before it would grant relief. Thus the court was not called upon to reassess or to make a new rate, but merely to adopt those already made, those which the taxing officers themselves would have had to readopt if a new assessment had been ordered under the law. (Stats. 1893, p. 290.) If there could be any question of the general powers of a court in equity to render such a decree there can be none as to its power in this state by virtue of section 187 of the Code of Civil Procedure, which provides that whenever jurisdiction over any matter is conferred all means necessary to carry the jurisdiction into effect are conferred with it.

The judgment and order appealed from are therefore affirmed.

McFarland, J., and Lorigan, J., concurred.

[L. A. No. 1878. Department One.—March 9, 1907.]

In the Matter of the Estate of CHARLOTTE HAINES,
Deceased.

WILL—DEVISE OF LIFE ESTATE SUBJECT TO CHARGE.—A will which devises certain lands to the grandchildren of the testatrix with the proviso that their respective mothers, who were the daughters of the testatrix, should have "the full control and possession and all rentals and income of the lands willed to their children during their natural lives,

except that each one shall every year put out one hundred dollars at interest (to be divided between her two children), until her youngest child attains the age of twenty years," creates a life estate in each of the respective mothers as to the land devised to the grandchildren, subject only to a charge of one hundred dollars per annum, or fifty dollars each, in favor of their respective children, until the youngest child attains the age of twenty years, and subjects the devise to the grandchildren to the estate for life in the mothers.

ID.—DIRECTION FOR ACCUMULATION OF INCOME—SUSPENSION OF POWER OF ALIENATION.—By the provision for the benefit of the children it was intended that each child was to have, so long as he or she lived, until the youngest child attained the age of twenty years, or would have attained that age if living, the sum of fifty dollars per annum out of the life interest given to the mother, and that these sums were to be invested for his or her benefit and remain at interest during that period. To the extent stated, it is an attempted disposition of the income of the real property, and a direction for the accumulation thereof. So construed, there is no forbidden suspension of the absolute power of alienation, as such suspension is permitted for a period not longer than during the continuance of lives of persons in being at the creation of the limitation or condition; and in the case of each child, the trust for accumulation cannot continue longer than during the life of the designated beneficiary in being at the time of the creation of the trust.

ID.—PERIOD FOR ACCUMULATION OF INCOME LIMITED TO MINORITY OF BENEFICIARY.—Under section 724 of the Civil Code, providing that the accumulation cannot be for a longer term than the minority of the beneficiary, and section 725 of the same code, providing that if the direction for accumulation is for a longer term, "the direction only, whether separable or not from other provisions of the instrument, is void as respects the time beyond such minority," the direction for accumulation here should be held valid in the case of each child for the period of his or her minority, and void as respects the time beyond such minority.

ID.—TRUST DURING MINORITY OF BENEFICIARY.—A provision in the will that "All moneys, notes &c. which I may have to be divided between my two children and four grandchildren, and my daughters to have exclusive control of their children's money and invest it as they think best until they, the children, become of age," creates a valid trust, as to the share of each grandchild, in his or her mother, to continue during his or her minority, and the bequest of the property is subject to such trust.

APPEAL from a decree of the Superior Court of Ventura County distributing the estate of a deceased person. Felix W. Ewing, Judge.

The facts are stated in the opinion of the court.

H. L. Poplin, for Appellants.

B. T. Williams, and Williams & Bowker, for Respondents.

ANGELLOTTI, J.—This is an appeal from a decree of final distribution. The deceased died testate, leaving two surviving daughters, S. Maude Henderson and Edith M. McDivitt, and four surviving grandchildren,—viz. Haines T. Henderson and Gladys Henderson, children of S. Maude Henderson, and Frank Paul McDivitt and Edith Bernice McDivitt, children of Edith M. McDivitt. All the children are minors. By her will, which was holographic, she first made certain absolute bequests and devises to her daughters. The will then proceeded as follows: "To my grandchildren, Haines T. Henderson and Gladys Henderson, I give 38 acres in lot 19 Norway survey, also 3 acres in the same lot . . . also one half of my interest in subdivision 91 of los posas tract containing 532 acres, to F. Paul McDivitt and Edith Bernice McDivitt, my grandchildren, I give and devise 42.53 acres on lot 34 Norway survey, being my home place, also one half of my Los Posas land, provided that my daughters Maude Henderson and Edith McDivitt shall have the full control and possession and all rentals and incomes of the lands willed to their children during their natural lives, except that each one, shall every year put out one hundred dollars at interest (to be divided between her two children) until her youngest child attains the age of twenty years. All moneys notes &c. which I may have to be divided between my two children and four grandchildren, and my daughters to have exclusive control of their children's money and invest it as they think best until they, the children, become of age."

The controversy here is as to the effect of the proviso in the devises to the McDivitt grandchildren, and the provision giving the exclusive control of the personal property bequeathed to them to their mother, until they become of age, such grandchildren being the only appellants, and appealing only from such portions of said decree as relate to these provisions. The court below distributed to each of said children the realty described in the devises to them, with this proviso,

—viz. “providing that Edith M. McDivitt, the mother of said children, shall have the full possession and ownership of all the land, issues and profits thereof, during her natural life,” in one case, and the following,—viz. “provided . . . that Edith M. McDivitt, the mother of Frank Paul McDivitt and Edith Bernice McDivitt, shall have the full possession and ownership of the rents, issues and profits of her children’s share thereof, during her natural life.” In another part of the decree, and as a distinctly independent provision having no reference to the lands devised, it was ordered that said Edith M. McDivitt “each year place the sum of one hundred dollars on interest in some safe interest-bearing securities, to be approved by this court, to the credit of her two children, Frank Paul McDivitt and Edith Bernice McDivitt, to be divided equally between the said children, upon the said Edith Bernice McDivitt arriving at the age of twenty years.” To each of said grandchildren was distributed, \$1,634.73, “provided, however, that Edith M. McDivitt, the mother of said child, shall have the exclusive control of said sum of money and to invest the same in interest-bearing securities, to be approved by this court,” until the said child shall have attained the age of majority.

There is no great difficulty in determining the intention of the testatrix from the provisions of her will, notwithstanding that this intention might have been expressed in more apt language by one versed in legal phraseology.

As to the land concerning which the devise to the grandchildren was made, it was clearly intended to give a life estate to their mother, subject only to a charge of one hundred dollars per annum in favor of the two children (fifty dollars for each), until the younger child attains the age of twenty years, and to subject the devise to the grandchildren to this estate for life in the mother. The devise to the grandchildren is expressly made subject to the proviso, and the proviso is that the mothers “shall have the full control *and* possession and all rentals and incomes of the lands willed to their children” during their natural lives. Herein is to be found every element going to make up a life estate. The exception as to the one hundred dollars per annum that is to be put out at interest for the children, which creates a charge upon such life estate, also makes clearer the intention of the testatrix that the

respective mothers were to have life estates in the lands otherwise given to their children. It is elementary that it is the duty of the courts to carry into effect the intention of the testator as the same is expressed in his will, provided that such intention be consistent with the rules of law. It cannot, of course, be successfully claimed that there is any rule of law that is violated by a devise of an estate for her life to the mother burdened with an annual charge on the rents and profits in favor of her living children for a specified time, and a devise of the lands subject to such life estate to such children.

It is claimed, however, that the exception as to the one hundred dollars per annum for the benefit of the children constitutes a direction for the accumulation of the income of property for a period longer than the minority of the beneficiaries, the youngest child being the daughter, Edith Bernice, who is five years younger than her brother, Frank Paul, and that such exception is therefore void under the provisions of sections 723 and 724 of the Civil Code, which allow such accumulations only during the minority of the beneficiaries, and that it is also void for the reason that it may unduly suspend the absolute power of alienation. The provision simply is that the mother shall "every year put out \$100 at interest (to be divided between her two children) until her youngest child attains the age of twenty years." The necessary implication from this language appears to us to be that each child was to have, so long as he or she lived, until the youngest child attained the age of twenty years, or would have attained that age if living, the sum of fifty dollars per annum out of the life interest given to the mother; and that these sums were to be invested for his or her benefit and remain at interest during said period. Reading the provision in connection with the provisions immediately preceding it, it is plain that to the extent stated it is an attempted disposition of the income of the real property, and a direction for the accumulation thereof. So construed, however, there is no forbidden suspension of the absolute power of alienation, such suspension being permitted for a period not longer than during the continuance of lives of persons in being at the creation of the limitation or condition. We have here two provisions, one for the accumulation of fifty dollars per annum for the

older child until the younger attains, or would, if living, attain, the age of twenty years, and one for the accumulation of fifty dollars per annum for the younger child for the same period. The provision for accumulation for each child, being for the sole benefit of such child, cannot by any possibility suspend the absolute power of alienation for a longer period than during the life of such child. If the older child die before the specified time, the trust for accumulation for his benefit at once determines for lack of a beneficiary, and the property already accumulated immediately vests in his heirs. The same is true as to the younger child. In neither case can the trust for accumulation continue longer than during the life of the designated beneficiary in being at the time of the creation of the trust. (Civ. Code, secs. 715, 716; *Estate of Hendy*, 118 Cal. 656, [50 Pac. 753]; *Estate of Steele*, 124 Cal. 532, 539, [57 Pac. 564].) Under the provisions of section 724 of the Civil Code, the accumulation cannot be for a longer term than the minority of the beneficiary. Section 725 of the Civil Code provides that if the direction for accumulation is for a longer term than during the minority of the beneficiaries, "the direction only, whether separable or not from other provisions of the instrument, is void as respects the time beyond such minority." It follows that the direction for accumulation here should be held valid in the case of each child for the period of his or her minority, and void as respects the time beyond such minority.

As to the "money, notes, &c." divided between her two children and four grandchildren, it is clear that as to the share of each grandchild the testatrix intended to create a trust in his or her mother, to continue during his or her minority, and that the bequest of the property is subject to such trust. No reason appears why this intention could not be carried into effect. (See *Estate of Reith*, 144 Cal. 314, [77 Pac. 942].)

In view of what has been said, it is apparent that the court below did not err in the manner of distribution of the \$1,634.73 awarded to each of the appellants. Substantially, this property is distributed to the trustee for the purposes of the trust, and, subject to such trust, to the appellants. (See *Estate of Reith*, 144 Cal. 314, [77 Pac. 942].) Nor did the court err in distributing to the mother of appellants for her natural

life the full possession and ownership of all the rents, issues, and profits of the land devised to them, which we take to be the effect of the decree in this regard. But for the protection of appellants' respective rights created by the provision as to the annual investment of one hundred dollars for their benefit, the distribution to the mother should have been made subject, in terms, to the annual charge upon the property distributed of fifty dollars for each appellant. This result is not accomplished by the independent provision in the decree as to the annual investment of one hundred dollars by the mother. Nor is that provision entirely in accord with the intention of the testatrix, so far as that intention can be legally carried into effect. The decree should be modified to the extent of adding to the so-called provisos in favor of the mother in the distribution of the lands to appellants the following, viz.: "The life estate in the above-described land hereby distributed to Edith M. McDivitt is distributed to her subject to the following charges, which shall constitute liens on said interest, to wit: 1st. The sum of \$50 each and every year during the continuance of said life estate, until her daughter, Edith Bernice McDivitt, attains the age of twenty years, or would attain that age if living, for the benefit of her son, Frank Paul McDivitt, the same to be during the whole period of the minority of said Frank Paul McDivitt kept by said Edith M. McDivitt on interest in some safe interest-bearing securities to be approved by this court, and accumulated for his benefit, provided always, that in the event of the death of the said Frank Paul McDivitt before the time specified above, said annual charge shall thereupon cease and determine, and all accumulations thereof at once vest in his heirs. 2nd. The sum of \$50 each and every year during the continuance of said life estate, until her daughter, Edith Bernice McDivitt, attains the age of twenty years, for the benefit of said daughter, Edith Bernice McDivitt, the same to be during the whole period of the minority of said Edith Bernice McDivitt, kept by said Edith M. McDivitt on interest in some safe interest-bearing securities to be approved by this court and accumulated for her benefit, provided always that in the event of the death of the said Edith Bernice McDivitt at any time before attaining the age of twenty years, said annual charge shall thereupon cease and determine, and all accumulations thereof at once vest in her heirs."

The provision now in the decree as to the annual one-hundred-dollar investment should be stricken out.

It is ordered that in the respects suggested the portions of the decree appealed from be and the same are hereby modified, and, so modified, the decree is hereby affirmed.

Shaw, J., and Sloss, J., concurred.

[L. A. No. 1720. Department One.—March 9, 1907.]

CITY OF LOS ANGELES, Respondent, v. LOS ANGELES FARMING AND MILLING COMPANY (a corporation), Appellant.

ACTION TO DETERMINE ADVERSE CLAIMS TO REALTY—PLEADING.—The complaint in an action to determine adverse claims to real property, brought against a corporate defendant properly named and four other defendants sued by fictitious names, which alleges that the names of the defendants sued by fictitious designations were unknown to the plaintiff, that the title in fee to the land was in the plaintiff, and in the usual manner avers that the defendants, without right, make some claim thereto adversely to plaintiff's title and estate, states a cause of action under section 738 of the Code of Civil Procedure, and not under sections 749-751 of that code.

Id.—PROCEEDING UNDER SECTIONS 749-751 OF THE CODE OF CIVIL PROCEDURE.—Where the action was begun after the act of March 8, 1903, amending sections 749, 750, and 751 of the Code of Civil Procedure, took effect, the question whether or not it is a proceeding under those sections is to be determined by the terms of the sections as then amended.

Id.—JUDGMENT BY DEFAULT—EVIDENCE NOT REQUIRED.—In such an action a judgment by default against the named defendant, who had been personally served with summons, is not void for the failure of the record to show that the court heard or required evidence in proof of the plaintiff's case. No such proof was required, as the default of the defendant in an ordinary action of this character admits, so far as such defaulting defendant is concerned, the absolute verity of all the allegations of the complaint.

APPEAL from an order of the Superior Court of Los Angeles County refusing to set aside a default and judgment.
M. T. Allen, Judge.

The facts are stated in the opinion of the court.

R. M. Widney, for Appellant.

W. B. Mathews, H. T. Lee, and J. R. Scott, for Respondent.

SHAW, J.—On July 24, 1903, plaintiff recovered judgment against the defendant above named. The judgment was rendered upon the default of said defendant, duly entered for its failure to appear after due personal service of summons. On October 24, 1904, more than a year afterward, the defendant served on plaintiff a notice of motion to set aside the default and judgment. The ground of the motion, as stated in the notice, was that the judgment is void on the face of the record, for want of jurisdiction. The motion was denied and the defendant appeals from the order.

The complaint states in the usual form a cause of action to determine adverse claims to real property, as provided in section 738 of the Code of Civil Procedure. The summons is in the form prescribed in section 407 of the Code of Civil Procedure. The service was made on the president of the defendant, the default was regularly entered, and the judgment was given in all respects in the regular mode provided for judgments in such actions. No ground for the motion is apparent.

The contention of the defendant is that the cause of action stated in the complaint is not an action under section 738 of the Code of Civil Procedure, but that it is a cause of action against all persons, whether known or unknown, who make any adverse claim, an action of the character authorized by sections 749, 750, and 751 of the Code of Civil Procedure, and that the entire proceeding is void because it is not in compliance with the special provisions of those sections regarding that special proceeding. We need not particularly consider the merits of the argument made in that behalf. The premises on which the argument is based are lacking. The cause of action stated is, as already said, an action under section 738. It alleges the title of the plaintiff in fee to the real property described, and in the usual manner avers that the defendants, without right, make some claim thereto adversely to plaintiff's title and estate. There are no allegations of actual, exclusive, and adverse possession by plaintiff con-

tinuously for twenty years, nor any of the special averments required in an action under section 749. The action was begun on April 25, 1903, which was after the act of March 8, 1903, amending sections 749, 750, and 751, took effect, and therefore the question whether or not it is a proceeding under those sections is to be determined by the terms of the sections as then amended. We have no doubt it was an ordinary action, and not a proceeding as in those sections authorized.

Four other persons were made defendants under the fictitious names of John Doe, Richard Roe, Jane Doe, and Mary Roe, it being alleged that their *names* were unknown to plaintiff. This does not bring the case within section 749. It is not averred that the *persons* are unknown. Nor is the action against *all* unknown persons, nor even against all persons whose names are unknown. It is against four certain persons who make adverse claim, and their true names only are unknown.

We would not be understood to intimate, by anything in this opinion, that a judgment in a proceeding under sections 749, 750, and 751, against a named defendant who was personally served with the summons, would be void if the proceedings were lacking in the respects in which it is claimed the present proceedings fail. As this is not such a proceeding, it is unnecessary to consider whether or not the alleged defects would render it void, if it was a proceeding of that character.

It is claimed that the judgment is void because the record does not show that the court heard or required evidence in proof of the plaintiff's case. This was not necessary on default in an ordinary action, where the summons is personally served, except where the taking of an account, or the proof of damages or of some other fact, is necessary to enable the court to give judgment or carry it into effect. (Code Civ. Proc., sec. 585.) Here no such proof was required. The default of the defendant in an ordinary action of this character admits, so far as such defaulting defendant is concerned, the absolute verity of all the allegations of the complaint. No amount of evidence could establish the facts more effectually for the purpose of rendering the judgment, as against such defendant.

The order is affirmed.

Angellotti, J., and Sloss, J., concurred.

[L. A. Nos. 1510, 1518. Department One.—March 9, 1907.]

ANNIE J. PIERCE, Appellant, v. **HANNAH M. EDWARDS**, Respondent, and **HIRAM C. PIERCE**, Appellant.

VENDOR AND VENDEE—COVENANT TO DELIVER ACTUAL POSSESSION.—A written contract for the sale and purchase of real estate by the terms of which the vendor agrees to sell the land to the vendee for a specified sum and "to deliver" the same by a specified date, and the vendee agrees "to take" the land and pay the specified sum, imposes the obligation on the vendor to put the vendee in the actual physical possession of the land, and until such possession is tendered the vendee is not in default.

ID.—LAND IN POSSESSION OF TENANTS—WRITTEN CONTRACT CANNOT BE VARIED BY CONTRADICTIONARY ORAL UNDERSTANDING—PLEADING.—In an action by the vendor to recover damages for the breach of such contract, allegations in the complaint that the writing was not intended to and did not embrace all the details of the contract, and that it was agreed between the parties as a part of the contract that the tenants on the land should remain and become tenants of the vendee, must be construed most strongly against the pleader, and it must be inferred that the land was in the possession of tenants and that an actual delivery thereof was not tendered to the purchaser. The facts so alleged did not obviate the necessity of an actual delivery of possession by the vendor, as the written contract, expressly requiring such delivery, could not be added to or varied by a contemporaneous oral understanding in direct contradiction thereof.

ID.—AGREEMENT OF TENANT TO ATTORN TO PURCHASER.—In such action an allegation by the vendor, that at the time of the contract the premises were leased to a designated person, "who consented and agreed to and with the vendee to become and be the tenant of the vendee on said premises," is not sufficient to avoid the necessity of an actual delivery of possession by the vendor, there being no allegation that such agreement of the tenant was a part of the contract between the vendor and vendee, or that the purchaser agreed to accept such person as her tenant; and the vendor, not being a party to such agreement, cannot take advantage of it for the purpose of relieving himself from the failure to perform the stipulations of his contract.

ID.—KNOWLEDGE BY PURCHASER OF POSSESSION BY TENANTS.—The fact that the purchaser knew at the time of the contract that the land was in the possession of tenants cannot be considered in construing the contract so as to make the obligation to deliver merely an obligation to deliver the land in the condition in which it was,—that is, as subject to lease and in the possession of tenants.

APPEALS from judgments of the Superior Court of Santa Barbara County. Felix W. Ewing, Judge presiding.

The facts are stated in the opinion of the court.

W. S. Day, and B. F. Thomas, for Appellants.

H. P. Starbuck, and Canfield & Starbuck, for Respondent.

SLOSS, J.—The plaintiff, Annie J. Pierce, brought this action to recover damages for the breach, by the defendant Hannah M. Edwards, of a contract whereby said Hannah M. Edwards agreed to buy of the co-defendant, Hiram C. Pierce, a certain tract of land. The plaintiff sought to establish a cause of action in herself by alleging that Hiram C. Pierce, who was her husband, had taken title to the land under circumstances which, as she claims, made him a constructive trustee for her, and accordingly entitled her to receive the fruits of any contract made by him respecting the land. Hiram C. Pierce answered, denying the facts on which the claim of a trust relation is based, and filed a cross-complaint in which he sought, on his own behalf, to recover damages from Mrs. Edwards for breach of the contract of purchase. In effect, therefore, the Pierces were separately, as plaintiffs, seeking to recover from Mrs. Edwards damages for the alleged breach of the same contract.

Demurrers of Mrs. Edwards to a second amended complaint of plaintiff and to an amended cross-complaint of defendant Hiram C. Pierce were sustained, and further amendment being waived, judgments were entered in favor of Mrs. Edwards against the plaintiff and against the defendant Hiram C. Pierce. From these judgments, respectively, the plaintiff and the defendant Pierce appeal.

The only question that need be considered here is whether either the complaint or the cross-complaint demurred to, states a cause of action against Mrs. Edwards. Omitting the allegations which are inserted in the said complaint for the purpose of showing the plaintiff's right to enforce the contract, the two pleadings in question contain a number of allegations in common. Thus each sets out in full the contract relied on, which was in writing, and reads as follows:—

"SAMUEL EDWARDS

"ORCHARD FARM

"SATICOY, VENTURA CO., CAL., March 24, 1902.

SANTA BARBARA, CAL.

I, Hiram C. Pierce, agree to sell to Mrs. Samuel Edwards my ranch in the Santa Ynez Valley called 'San Lucas Rancho' for the sum of thirty-five thousand dollars, \$35,000 Cash—and I hereby agree to deliver said Rancho to Mrs. Samuel Edwards by the first of May—said Rancho consists of Tracts A & B of the subdivision of the Rancho 'Lomas de la Purificota'; and Mrs. Samuel Edwards agrees to take said rancho and pay the above sum.

"HIRAM C. PIERCE.

"ANNIE J. PIERCE.

"HANNAH M. EDWARDS."

(The "Mrs. Samuel Edwards" named in this writing is the defendant Hannah M. Edwards.)

It is alleged in both the second amended complaint and in the amended cross-complaint "That said memorandum of contract was not intended to and did not embrace all the details of the contract." It is also alleged that at the time the contract was made the property was subject to a trust-deed to secure indebtedness and to two mortgages. Both the second amended complaint and the amended cross-complaint contain an allegation that on the first day of May, 1902, the plaintiff (cross-complainant) tendered to the defendant Hannah M. Edwards a good and sufficient deed of the premises, a duly executed reconveyance releasing the trust-deed, and good and sufficient releases of the mortgages, and that said defendant refused to accept said tenders or to pay the said sum of thirty-five thousand dollars. There is no allegation in either pleading under consideration that delivery or possession of the property was tendered to Mrs. Edwards.

We are of opinion that under the contract above quoted the purchaser was entitled to be put in the actual possession of the ranch, and that until such possession was tendered her she was not in default.

That the contract provides for a delivery of possession as well as a transfer of title is, we think, obvious from a mere reading of its terms. The vendor agrees to sell the ranch

for the sum of thirty-five thousand dollars and agrees "to deliver said rancho to Mrs. Samuel Edwards by the first of May." The purchaser agrees to take the rancho and pay the above sum. If the agreement had contemplated merely a transfer of the title in consideration of the payment of a certain sum, it would not have been necessary to say anything more than that the vendor agreed to sell the ranch and the purchaser agreed to pay the specified sum. The parties, however, inserted the additional clause binding the vendor "to deliver" the property at a certain time, and binding the vendee "to take" said property. The obligation assumed by the vendor to deliver the property as used in this connection cannot be taken to mean anything else than an obligation to turn over the actual physical possession. The case is very similar to *Benson v. Shotwell*, 87 Cal. 49, [25 Pac. 249]. In that case there was a contract of sale which contained these words: "Possession of lot given and guaranteed to purchaser on transfer of title." It was held that under this contract the purchaser was entitled not only to a transfer of title, but to a delivery of possession before being called upon to make his payment. The court said: "The word 'possession,' as used in this connection, is to be understood and construed in its ordinary and popular sense." While in the contract here under consideration we do not find the word "possession," we think the language here used—i. e. an agreement to deliver the rancho—is to be interpreted as requiring a delivery of the physical possession.

Both the plaintiff and the cross-complainant in framing their pleadings saw the force of this point and sought to evade it by further allegations.

The plaintiff alleges in her second amended complaint, as has been stated, that the written instrument was not intended to and did not embrace all the details of the contract, and avers that "It was also stipulated and agreed between the parties and as a part of said contract that the tenants on said land should remain and become the tenants of the purchaser, Hannah M. Edwards." Under the well-established rule requiring pleadings to be construed most strongly against the pleader, it must be inferred from this allegation that the land *was* in the possession of tenants, and that an actual delivery thereof was not tendered to the purchaser. Did this

clause obviate the necessity of such actual delivery? We think not. "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." (Civ. Code, sec. 1625.) "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives . . . no evidence of the terms of the agreement other than the contents of the writing." (Code Civ. Proc., sec. 1856.) And these sections declare a rule of law so long and so well established that it is needless to cite further authority in its support. It is true that there is an exception to this rule; that it does not apply where the parties have not incorporated into the instrument all of the terms of their agreement (*Guidery v. Green*, 95 Cal. 630, [30 Pac. 786]; *Sivers v. Sivers*, 97 Cal. 518, [32 Pac. 571]; *Savings Bank v. Asbury*, 117 Cal. 96, 103, [48 Pac. 1081]), and the plaintiff has sought to bring herself within this exception by her allegation that the memorandum of contract "was not intended to and did not embrace all the details of the contract." But the exception allowing oral evidence of terms of an agreement not included in a writing is itself subject to the qualification that the oral stipulations sought to be proved are not inconsistent with the terms embraced in the writing. (*Guidery v. Green*, 95 Cal. 630, [30 Pac. 789]; *Sivers v. Sivers*, 97 Cal. 518, [32 Pac. 571]; *Savings Bank etc. v. Asbury*, 117 Cal. 96, 103, [48 Pac. 1081].) Here the contemporaneous understanding relied upon is directly in conflict with the terms of the writing. By the writing the parties agreed to deliver the property, an agreement which means, and can mean only, that they were to transfer the actual possession. An agreement that the possession was not to be transferred and that the persons in possession should hold under the vendee, instead of under the vendor, is not an addition to the terms of the writing, but a direct contradiction of them. The following language from the decision in *Benson v. Shotwell*, 87 Cal. 49, [25 Pac. 249], illustrates the divergence between the written instrument and the asserted additional understanding: "It is claimed on the part of respondent, that the tenants

who were under lease from plaintiff said while there that they would acknowledge the defendant as their landlord, and attorn to him, and that this was all that was required. But this was not the measure of plaintiff's obligation, according to the letter of his bond. According to that paper, defendant was entitled to an actual *possessio pedis* of the whole lot. The language of the contract implied nothing less. Constructive possession, and the duty to attorn, would follow the title; and if that was all that was meant, there was no need to have said anything about possession in the contract." So here, if the contract had said nothing about delivery, the mere transfer of the title would have entitled the grantee to receive the rents from the tenants. (Civ. Code, sec. 1111.) To allow any force to the stipulation that the tenants on the land should become the tenants of the purchaser would be equivalent to striking from the contract the provision that the vendor agreed to deliver the rancho to the vendee by the 1st of May.

For these reasons we think that the second amended complaint failed to state a cause of action against the defendant Edwards, and it is therefore unnecessary to consider the further point made by the respondent, that the facts averred were insufficient to show a constructive or resulting trust in the contract in favor of the plaintiff.

The allegations of the amended cross-complaint are somewhat different. There is no averment of an agreement by the vendee to accept any of the tenants as her tenants. In this behalf the cross-complainant alleges merely "that said premises were leased at the time to one Newel Kane, who consented and agreed to and with said Hannah M. Edwards to become and be her tenant on said premises." If the construction heretofore given to the writing be correct, this cross-complaint comes even more clearly than the complaint within the reasoning of *Benson v. Shotwell*, 87 Cal. 49, [25 Pac. 249]. It is not alleged that this agreement of the tenant was a part of the contract between Hiram C. Pierce and Hannah M. Edwards. All that is said is that the tenant in possession of the land undertook to acknowledge the purchaser as his landlord. But this was not sufficient. The purchaser was entitled to actual possession, and since the cross-complaint not only fails to allege a delivery of such possession, but shows

affirmatively that the possession was in the third party, no cause of action is stated. It is claimed that the matter alleged shows a waiver by the purchaser of actual delivery, but this cannot be. It is not alleged that such purchaser agreed to accept Kane as her tenant. The most that can be said is that Kane agreed to become her tenant—a thing which, as we have seen, he would under the law have been obliged to do without any agreement. Again, the vendor was not a party to any such agreement and cannot take advantage of it for the purpose of relieving himself from the effect of failure to perform the stipulations of his contract.

It is suggested that the fact that the purchaser knew at the time she made her contract that the property was in the possession of tenants should be considered in construing the contract so as to make the obligation to deliver merely an obligation to deliver the land in the condition in which it was,—i. e. as subject to lease and in the possession of tenants. But we see no force in this. The same argument would lead to the result that an agreement to sell land which is known by the purchaser to be subject to certain encumbrances requires the purchaser to take and pay for the land, notwithstanding such encumbrances. The purchaser, knowing that the land was in the possession of third parties, stipulated for its delivery to her. She is entitled to stand upon this stipulation, which may have been insisted upon for the very reason that she knew of the tenancies. The contract bound the seller to terminate the tenancies, or in some other way place himself in position to comply with his undertaking to deliver the rancho by the 1st of May.

Each of the demurrers was properly sustained. The judgment is affirmed.

Shaw, J., and Angellotti, J., concurred.

[S. F. No. 4770. In Bank.—March 11, 1907.]

ABRAHAM RUEF, Petitioner, v. SUPERIOR COURT OF
THE CITY AND COUNTY OF SAN FRANCISCO,
and FRANK H. DUNNE, Judge thereof, Defendants.

CRIMINAL LAW—INDICTMENT—REMAND ON HABEAS CORPUS—WRIT OF
ERROR TO UNITED STATES SUPREME COURT—STAY OF PROCEEDING.—
Where a prisoner under indictment and awaiting trial in the superior
court applied to another department of the same court for a writ of
habeas corpus, which was granted, and upon a hearing thereon he
was remanded to custody, and thereupon applied for and obtained
from the judge or court issuing the writ of *habeas corpus* a writ
of error to the supreme court of the United States on the ground
that the order of remand was in contravention of his rights under
the constitution of the United States, the writ of error, if prop-
erly issued, did not operate to stay proceedings in the court having
jurisdiction of the indictment.

APPLICATION for a Writ of Prohibition to the Superior
Court of the City and County of San Francisco and to Frank
H. Dunne, the Judge thereof.

The facts are stated in the opinion of the court.

Samuel M. Shortridge, for Petitioner.

THE COURT.—The petitioner, who was under indictment
and awaiting trial in the superior court, applied to another
department of the same court for a writ of *habeas corpus*,
which was granted. Upon a hearing, he was remanded to
custody, and thereupon applied for, and obtained from the
judge or court issuing the writ of *habeas corpus* a writ of
error to the supreme court of the United States, it being
claimed that the order of remand was in contravention of
petitioner's rights under the constitution of the United States.
The proceedings necessary to perfect the issuance and service
of the writ of error and the citation thereunder were taken.

The petitioner now applies for a writ of prohibition to
restrain the court in which the indictment is pending from
proceeding with his trial.

We are satisfied that the writ of error, if it was properly
issued, does not operate to stay proceedings in the court
having jurisdiction of the indictment.

The petition is denied.

[L. A. No. 1441. Department Two.—March 14, 1907.]

OSCAR BONNER OIL COMPANY, Respondent, v. PENNSYLVANIA OIL COMPANY, Appellant.

BANKRUPTCY—SUBSTITUTION OF TRUSTEE AS APPELLANT.—Where a judgment debtor is adjudged a bankrupt pending his appeal from the judgment, the appellate court on the mere motion of the judgment debtor will not order his trustee in bankruptcy to be substituted in his place as the appellant.

CORPORATION—BY-LAW—COMPOSITION AGREEMENT—AUTHORITY OF SECRETARY.—A by-law of a corporation providing that “the president and secretary of this company shall constitute *ex officio* an executive committee, who shall attend to the business of the company, and who shall audit and pay the current bills of the company, all under the general direction of the board of directors,” does not confer express authority on the secretary alone to execute a composition agreement; nor is such authority conferred on the secretary by a resolution of the board of directors empowering the president, vice-president, and treasurer to sign and indorse checks and drafts.

ID.—OSTENSIBLE AUTHORITY OF SECRETARY.—The fact that the secretary of a corporation received a promissory note and represented his corporation in the transactions which led to its execution did not constitute him the agent, ostensible or otherwise, of the corporation to bind it by signing a composition agreement concerning the note.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Tanner & Taft, and Tanner, Taft & Odell, for Appellant.

George A. Corbin, for Respondent.

LORIGAN, J.—This action was brought to recover upon a promissory note executed by defendant for \$515, with interest, in favor of plaintiff.

The complaint set forth a copy of the note sued on, dated August 14, 1901, and alleged non-payment. The complaint then further alleged the making on January 25, 1902, of a composition agreement between the defendant and certain of its creditors whereby certain designated property of the

defendant consisting of its plant, wells, pipes, pipe-line, etc., was delivered to trustees to be managed and operated by them for the mutual benefit of the company and its creditors signing the agreement, and whereby the proceeds from the operation of the plant, etc., were to be applied to the payment of the debts due the creditors of the company, as particularly set forth in the agreement; that said agreement purported to have been consented to and executed by plaintiff through its secretary, it being signed "Oscar Bonner Oil Company by A. M. Cates, Sec'y"; that the consent of plaintiff was never given to the making of said contract, nor was it ever ratified or authorized by resolution of its board of directors, nor was it signed or executed by any officer of plaintiff authorized to do so.

The answer admitted the execution of the note and its non-payment and the making of the composition agreement as alleged in the complaint (the agreement was appended to the complaint as an exhibit and made part thereof), denied non-execution thereof by plaintiff as alleged in the complaint, and set up affirmatively that the plaintiff duly and legally caused said agreement and contract to be signed and executed by its secretary; that thereby the same became binding on plaintiff; that by its terms the obligation to pay—the note sued on—and its maturity were postponed, and that at the time this action was commenced there was nothing due or payable to plaintiff on said note.

Upon these issues the case was tried and the court found that the consent of plaintiff was never given or obtained to the making of said composition contract, nor was it ever authorized or ratified by resolution of its board of directors, nor was it ever signed, executed, or delivered by any officer thereunto authorized, nor under the corporate seal of said plaintiff company.

Thereupon judgment was rendered for plaintiff for the sum of \$515, with interest, and from the judgment and an order denying its motion for a new trial defendant appeals.

Before considering the appeal upon its merits it will be necessary to refer to and dispose of a suggestion and motion made and submitted when this appeal came up for argument in this court. The suggestion was that on May 15, 1905, in the district court of the United States for the southern dis-

trict of California, the appellant had been adjudged a bankrupt; the motion was that C. B. White, the trustee in bankruptcy, be substituted as appellant in place of the Pennsylvania Oil Company. No reason was given, when the suggestion and motion were presented, why it was necessary to have the trustee in bankruptcy intervene by substitution, nor how any benefit could possibly accrue to the bankrupt's estate, as far as creditors are concerned, by the substitution.

This action was commenced against defendant in 1902 long prior to the adjudication in bankruptcy.

In *Brandenburgh on Bankruptcy* (sec. 276) it is said: "Suits begun against a bankrupt before the latter's bankruptcy may be defended or stayed in the discretion of the court of bankruptcy according as the interests of the bankrupt's creditors may require, and if it is decided to defend them the trustee is entitled to be made a party and the bankrupt will be enjoined from interfering. The court in which an action is pending against the bankrupt will not compel the trustee to become a party."

And (*Id.*), section 251, "When the right of the said court is to be questioned it can be done by the intervention of the trustee alone."

In *Collier on Bankruptcy* it is stated (p. 131): "A court of bankruptcy may, but need not, order the trustee to intervene in a suit against the bankrupt. The said court cannot, on the other hand, compel him to intervene."

Now, it does not appear from anything in the suggestion or motion, that the court in bankruptcy has directed the trustee in bankruptcy to intervene in this appeal, nor is the trustee himself moving to intervene, nor asking that this court substitute him as a party appellant in the action. The application is made solely by and on behalf of the appellant and presented by the attorneys for the appellant. But appellant, as the bankrupt, has no right to make such motion for the trustee. This, according to the rules above stated, must proceed from the trustee himself, and, as he has not sought to intervene, the appellant is not warranted in injecting him into the case on its own volition. The motion to substitute is therefore denied. (See *Reynolds v. Pennsylvania Oil Co.*, ante, p. 629, [89 Pac. 910].)

Now, as to the merits of the appeal.

The only defense urged in the trial court was the composition agreement referred to, and it is insisted by appellant that the finding of the court respecting it is not sustained by the evidence.

As to the evidence upon the subject of the execution of that contract. A. M. Cates was called as a witness upon the trial and testified that he was secretary of the plaintiff corporation at the time the note sued on was delivered by defendant to plaintiff; that no part of said note had been paid; that he was also secretary of plaintiff corporation at the time the agreement sued on in plaintiff's complaint was executed, and that he signed the name of plaintiff to said agreement as secretary, but that he had no authority to do so; that he had asked his brother, Dr. H. G. Cates, who was then a director and also the president of the company, whether he should sign the agreement on behalf of the company, and his brother replied that he was not personally in favor of the company's executing it, but that if he (the secretary) could get the consent of all the other directors of the company, he (the president) would have no objection; that he never spoke to any of the other directors about the matter and never obtained their consent or direction about it, but signed the name of the company to the agreement on his own motion, believing that his action would be ratified; that it was not ratified, as there had been no meeting of the board of directors of the plaintiff corporation since that time; that there was no consideration moving to the plaintiff company for his signature to the agreement; that he was never the attorney of the plaintiff company and was never an officer of the defendant company. On cross-examination he testified that there had been no meeting of the board of directors of plaintiff since June 28, 1901; that the board of directors of plaintiff never authorized the acceptance of the note sued on; that witness accepted it from defendant as secretary of the plaintiff corporation without any authorization; that he was at the time of the execution of the agreement set out in the answer the attorney for defendant corporation, and was present at the meeting of the creditors at which said agreement was made. H. G. Cates, president of the plaintiff corporation, testified to the same matters stated by the secretary with reference to the signing of the agreement, before it was signed, and,

further, that when informed by the secretary that he had signed it, the witness told him he should not have signed the articles; that he did not do anything further with regard to the secretary's action; did not call the board of directors together, and did nothing until about the time of the institution of this action, when he authorized the bringing of it.

The defendant offered the following by-law of the plaintiff corporation: "The president and secretary of this company shall constitute *ex officio* an executive committee, who shall attend to the business of the company, and who shall audit and pay the current bills of the company, all under the general direction of the board of directors"; also the following from the minutes of the board of directors held on July 21, 1900: "Resolved, that H. G. Cates, president, or Simpson McClure, vice-president, and J. W. Hinton, treasurer of this corporation, be, and they are hereby, authorized to sign checks and drafts for and on behalf of this corporation, and that each of them be and he is hereby authorized to indorse checks and drafts payable to this corporation." Evidence was further offered by defendant to show that A. C. Cates was the attorney of the defendant corporation and secretary of the plaintiff corporation, and that he had acted as the representative of the plaintiff in the transactions leading up to the execution of the note sued on herein.

We think that under this evidence the court was fully warranted in making the finding it did. It certainly appears that A. M. Cates had no direct authority to sign the corporate agreement, unless it was derived from the by-law and the resolution offered in evidence. But under the by-law it is quite apparent that no authority was conferred upon the secretary to execute contracts of the character here involved, and it is equally apparent that, whatever business he and the president were authorized to attend to, could only be done by them conjointly. The resolution offered did not even remotely suggest any authority to execute such a contract, and certainly does not confer any power at all upon the secretary of the corporation to do anything. It is claimed by appellant, however, that if the secretary did not have express authority to execute the contract, he was at least the ostensible agent of the corporation for that purpose, and that his act is binding on it. But we cannot perceive anything

in the evidence which can support a claim of ostensible agency. There is nothing in it to show that at any time A. M. Cates represented the plaintiff in the execution of any written contract by it of any kind whatever. It seems that he received from the defendant the note sued on and represented it in the transactions which led to its execution. But that circumstance could not constitute him the agent, ostensible or otherwise, of the plaintiff, to bind it by signing the composition agreement concerning the note. We do not think that there was substantial conflict in the evidence as to want of authority upon the part of the secretary to execute this contract. In fact, we do not think that under the evidence any other finding could properly be arrived at.

It is claimed by respondent that, independent of this finding, plaintiff had the right, even under the composition agreement, to maintain this action; that there is nothing, directly or inferentially, in the contract precluding the subscribing creditors from prosecuting actions upon their respective claims. But, as we have concluded that the finding by the court that the plaintiff never executed the contract is sustained by the evidence, the construction of that contract is properly eliminated from consideration.

The judgment and order appealed from are affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[Crim. No. 1380. In Bank.—March 14, 1907.]

Ex Parte EUGENE E. SCHMITZ, on Habeas Corpus.

HABEAS CORPUS—VOLUNTARY CUSTODY—DISMISSAL OF PROCEEDINGS.—A proceeding by a prisoner under indictment to be discharged on *habeas corpus* from the custody of the sheriff will be dismissed if it appears upon the hearing that the alleged custody from which he seeks to be discharged was self-invoked and voluntary and submitted to only for the purpose of making a case on *habeas corpus*.

The facts are stated in the opinion of the court.

APPLICATION for a Writ of Habeas Corpus.

Campbell, Metson & Drew, and J. J. Barrett, for Petitioner.

William H. Langdon, District Attorney, and Francis J. Heney, Assistant District Attorney, for Respondent.

THE COURT.—The petitioner, against whom has been found and presented an indictment purporting to charge him with the crime of extortion, seeks his discharge on *habeas corpus* from the custody of the sheriff of the city and county of San Francisco upon two grounds, viz.: 1. That one of the grand jurors who participated in the finding of the indictment was incompetent to act as a grand juror, by reason of the fact that he had served and been discharged as a juror by a court of record of this state, within a year of the time that he was examined and impaneled to act as such grand juror; and 2. That the indictment does not charge a public offense.

Upon the hearing it was made to appear to this court, in fact expressly admitted by the petitioner, that being at large upon bail, he had procured himself, immediately before the application for a writ of *habeas corpus*, to be surrendered to the custody of the sheriff, solely for the purpose of presenting these questions for determination by this court, and that immediately upon the issuance of the writ he gave bail, in the same amount as had been previously required upon the indictment—in other words, that the alleged custody from which he seeks to be discharged was self-invoked and voluntary, submitted to only for the purpose of making a case on *habeas corpus*.

We are unable to see why these circumstances do not bring this case fully within the rule laid down in the case of *In re Gow*, 139 Cal. 242, [73 Pac. 145]. It there appeared that the surrender to the officer was merely for the purpose of suing out the writ, and lasted no longer than was necessary to file the petition and procure the order. It was there declared to be an abuse of the remedy by *habeas corpus* to apply it in cases where there is no actual imprisonment and no restraint, except that which is invited and voluntarily submitted to in order that a merely nominal prisoner may resort to the courts for the determination of the validity of an ordinance, or some question of that sort. It was said: "Our conclusion is, that such a practice ought not to be countenanced, and

hereafter the court will make strict inquiry in this class of cases whether the alleged imprisonment is actual and involuntary, and if it is found to be, as in this case, a merely nominal restraint, voluntarily submitted to for the purpose of making out a case, the proceeding will be dismissed." We deem the rule here declared a most salutary one, entirely in accord with the objects and purposes of the remedy by *habeas corpus*, and adhere thereto. (See, also, *In re Dykes*, 13 Okla. 339, [74 Pac. 506]; *In re Dill*, (Kan.) 11 Pac. 672; *Commonwealth v. Green*, 185 Pa. St. 641, [40 Atl. 96]; 21 Cyc. 290.)

The writ is discharged and the proceeding is dismissed.

[Crim. No. 1391. In Bank.—March 14, 1907.]

In the Matter of the Application of A. RUEF for a Writ of Habeas Corpus.

CRIMINAL LAW—GRAND JURY—COMPETENCY OF GRAND JUROR—VALIDITY OF INDICTMENT.—Under sections 896 and 995 of the Penal Code the fact that one of the members of a grand jury had served and been discharged as a juror by a court of record of this state within a year of the time that he was summoned and impaneled to act as a grand juror does not affect the validity of an indictment found by the grand jury.

Id.—HABEAS CORPUS—SUFFICIENCY OF INDICTMENT.—On *habeas corpus* the inquiry into the sufficiency of an indictment is limited, and where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on *habeas corpus*.

Id.—ADMISSION TO BAIL—APPEARANCE FOR TRIAL.—Under section 1129 of the Penal Code the trial court has discretion to grant or refuse bail to a defendant who has appeared for trial, and may commit him to custody to abide the judgment or further order of the court; and on an application on *habeas corpus* for admission to bail by a defendant under indictment the petition must affirmatively show that he has not appeared for trial.

APPLICATION for a Writ of Habeas Corpus directed to W. J. Biggy, an elisor appointed by the Superior Court of the City and County of San Francisco.

The facts are stated in the opinion of the court.

Henry Ach, Samuel M. Shortridge, Frank J. Murphy, and Charles H. Fairall, for Petitioner.

William H. Langdon, District Attorney, and Francis J. Heney, Assistant District Attorney, for Respondent.

THE COURT.—A petition for a writ of *habeas corpus* is presented by A. Ruef, who alleges that he is restrained of his liberty and held in custody under bench warrants issued by the superior court upon five indictments purporting to charge him with the crime of extortion.

Three grounds for the issuance of the writ are urged.

1. It is alleged that one of the members of the grand jury which found and returned the indictments was not competent, by reason of the fact that he had served and been discharged as a juror by a court of record of this state within a year of the time that he was summoned and impaneled to act as such grand juror. (Code Civ. Proc., sec. 199.) We are of opinion that this does not affect the validity of an indictment found by the grand jury. The Penal Code enumerates the grounds upon which an indictment may be set aside. (Pen. Code, sec. 995.) One of these grounds is "any ground which would have been good ground for challenge—to any individual grand juror." The Penal Code (sec. 896) provides for a challenge to an individual grand juror for six specified grounds *only*. The particular incompetency here relied on is not included. We think that the legislature, in declaring that persons who had been discharged as jurors within a year should not be competent, and at the same time denying to a defendant indicted by a grand jury including one or more such persons any remedy by way of motion or challenge, in effect provided that if the statutory rule prohibiting the service of such persons were not obeyed, the departure should not invalidate any indictment found. (Cf. Pen. Code, sec. 901.) Any statutory incompetency which is not made a basis for a challenge under Penal Code section 896 must be regarded as a mere direction to the court impaneling the jury.

2. It is claimed that the indictments failed to state a public offense. On *habeas corpus* the inquiry into the sufficiency of an indictment is limited. We think the true rule is that where an indictment purports or attempts to state an offense

of a kind of which the court assuming to proceed has jurisdiction the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on *habeas corpus*. Here the indictments clearly attempt to charge extortion, a crime defined by section 518 et seq. of the Penal Code, and within the jurisdiction of the superior court. Without expressing any opinion as to whether these indictments should be held to be good on demurrer or other direct attack, they are at least not, under the rule stated, so defective as to permit us to hold them void in this proceeding.

3. It is claimed that the writ should issue to admit the petitioner to bail, it being alleged that the superior court has refused to so admit him. Under section 1129 of the Penal Code, the trial court has discretion to grant or refuse bail to a defendant who has appeared for trial, and may commit him to custody to abide the judgment or further order of the court. The petition before us does not show that the defendant has not appeared for trial. This showing should be made affirmatively, in order that a case be presented entitling petitioner to bail.

The petition is denied.

[S. F. Nos. 4625, 4626, 4599, 4600. Department Two.—March 15, 1907.]

JOHN A. PAXTON, Respondent, v. BLITZ W. PAXTON,
Defendant and Appellant; BESSIE E. PAXTON, De-
fendant.

ROMA PAXTON, Respondent, v. The Same.

JOHN A. PAXTON, Respondent, v. The Same.

ROMA PAXTON, Respondent, v. The Same.

PARENT AND CHILD—DUTY OF PARENT TO SUPPORT ADULT CHILD—ACTION TO ENFORCE MAINTENANCE—JUDGMENT.—Under section 206 of the Civil Code the duty imposed upon parents to maintain their adult children who are poor and unable to maintain themselves by work is a legal duty, and creates a correlative legal right in the children

to have such maintenance, and they are proper parties to an action to enforce such right and compel the performance of such duty. Such right may be enforced by an action in equity, and in such action the court would have full jurisdiction to pronounce a judgment, reserving the power to modify it in the event that the changed conditions in the future should justly demand a modification.

ID.—ACTION TO ENFORCE STATUTORY RIGHT.—Where a right is given by statute without any prescribed remedy it may be enforced by any appropriate method recognized by the general law of procedure.

ID.—SUIT MONEY, COUNSEL FEES, AND MAINTENANCE PENDENTE LITE.—In an action to enforce the right given by section 206 of the Civil Code the court has power to make all orders necessary for that purpose, including orders for suit money, counsel fees, and maintenance *pendente lite*.

ID.—FATHER AND MOTHER AS DEFENDANTS—CHANGE OF VENUE.—A mother may be joined with the father as a defendant in an action by a child to enforce the right of maintenance, and where an action is brought in the county of her residence the place of trial will not be changed to the county in which the father resides if the mother does not join in the motion for the change.

APPEALS from orders of the Superior Court of the City and County of San Francisco allowing money for support, counsel fees, and costs *pendente lite*. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

James W. Oates, and John M. Burnett, for Appellant.

Charles F. Hanlon, for Respondent.

McFARLAND, J.—These four appeals arise out of two actions commenced in the superior court—one by John A. Paxton against his father, Blitz W. Paxton, and his mother, Bessie E. Paxton, for maintenance, under section 206 of the Civil Code, and the other a similar action brought by Roma Paxton against the same defendants, who were also her parents. In each of the cases the court made an order allowing small amounts of money for support, counsel fees, etc., *pendente lite*, and from each of these orders the defendant Blitz W. Paxton appeals. In each of said actions said defendant made a motion for a change of venue from the

superior court of the city and county of San Francisco, in which the action was begun, to the superior court of the county of Sonoma, which is alleged to be the county of said defendant's residence. The motion in each case was denied, and from the denial of the motion in each case said defendant appeals. And these four appeals are presented by one transcript under stipulation of counsel. As respondents do not object to any one of these appeals as not taken from an appealable order, we have assumed that the appeals are all properly taken.

As the two actions are substantially the same, we will direct our attention particularly to the one brought by John A. Paxton. It was averred in the complaint in this action that the plaintiff, John A. Paxton, is the son of the defendant; that he arrived at the age of majority on August 20, 1904, and "ever since has been and now is an adult person, and a poor person, who is unable to maintain himself by work"; that he is an invalid and totally blind, and his sight has been permanently lost and cannot be cured; and that by reason of his being an invalid and totally blind he is unable to work or render any service by which he could support himself. It is further averred that each of the defendants is able financially to contribute to his support—the details of this personal ability being stated; that he demanded of each of them that they support plaintiff, and they refused to do so; that a certain sum of money monthly would be a reasonable amount for his maintenance; and that plaintiff was totally unable to proceed with the litigation unless paid certain sums of money *pendente lite* for support, counsel fees, etc. The prayer is for a temporary allowance of money *pendente lite*, and that each of the defendants support plaintiff to the extent of the ability of each as long as he shall live and continue unable to support himself by work, and for such other relief, etc. The complaint fully brings plaintiff within the provision of section 206 of the Civil Code, which is as follows:—

"§ 206. *Reciprocal duties of parents and children in maintaining each other.* It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessities previously furnished to such parent is binding."

After the commencement of the action, on application of plaintiff, the court made an order that defendants show cause on a named day why an order should not be made that defendants pay plaintiff certain money *pendente lite*. Defendant Blitz made various objections to the hearing of this application, but they were overruled, and after a hearing the court ordered said defendant Blitz to pay plaintiff, *pendente lite* fifty dollars per month for maintenance, ten dollars for costs, and one hundred and fifty dollars for counsel fees.

Defendant demurred to the complaint, and his main objection to said *pendente lite* order is that the complaint does not state a cause of action, and the court had no jurisdiction to entertain it; and if that be so, of course the preliminary order appealed from was unwarranted. The most important question in the case is therefore whether such an alleged cause of action as is set forth in the complaint can be maintained in this state.

It will be observed that section 206 of the Civil Code does not provide any procedure or machinery for enforcing its provisions, and no special procedure is prescribed elsewhere. On account of this absence of procedure appellant contends that there is no method by which section 206 can be judicially enforced. According to this contention said section is merely an ornamental enunciation of a moral principle which ought to be observed by good people under the circumstances referred to in the section, but is not a law in the sense of a rule of action which such people are legally bound to obey. We do not think that this conclusion is maintainable. It may be admitted that where a statute creates a right and also prescribes a particular remedy or procedure for its enforcement, such procedure can alone be invoked for such enforcement; but that is as far as the rule goes. In such case the special procedure may be considered as part of the right—limiting and conditioning it. But where the right is given by statute without any prescribed remedy, it may be enforced by any appropriate method recognized by the general law of procedure. This principle is crystallized in section 1428 of the Civil Code, which provides that “an obligation arising from operation of law may be enforced in the manner provided by law, or by civil action, or proceeding.” And a suit in equity is peculiarly an appropriate remedy for the enforcement of

the duty imposed by said section. This principle was declared in the case of *Livingston v. Superior Court*, 117 Cal. 633, [49 Pac. 836]. An equitable action was there held to be the appropriate remedy for the enforcement of the right of a husband under section 176 of the Civil Code to be supported by his wife, and, so far as the remedy is concerned, there is no distinction between that case and the case at bar. If an equitable action lies in the one case, it certainly does in the other, for section 206 and section 176 are alike in this respect, that each enjoins a legal duty, but provides no procedure for its enforcement. In the *Livingston* case the court, having referred to the case of *Galland v. Galland*, 38 Cal. 265, (which we also cite on this question,) says: "There is no reason why we should not adhere to the doctrine announced in *Galland v. Galland*, 38 Cal. 265. It is in accord with the general principle that where a right exists and there is no adequate legal remedy, equity will take jurisdiction." The court further says: "Counsel have not pointed out by what ordinary action the obligation could be enforced, and I know of none. In what action, at law, could the court ascertain and determine what monthly allowance should be made for the future support of the husband, and enter a judgment awarding an execution each month for the amount?" It is true that courts have not generally undertaken to enforce the obligation of parents to maintain their infant children. Indeed, in England, under the common law, the maintenance of minor children was considered merely a moral obligation not enforceable at law. It was generally there held that an action against the parent for necessities furnished the child could not be maintained. This view has also been taken in some American decisions; although in others the other, and we think the better, rule has been declared that an action for necessities against a parent is maintainable. (See *Tiffany on Persons and Domestic Relations*, pp. 230, 234.) It is probable that these later decisions rest on the proposition that the obligation is only a moral one, but that this moral obligation is a good consideration for the furnishing of necessities, and a sufficient foundation for an action to recover for necessities which have been *actually furnished*, although no sufficient foundation for a decree for future maintenance. But in the case at bar we are not concerned with moral obligations.

Statutory law does not deal with mere moral obligations. When it declares a duty or a right it means a *legal* duty or right. Section 206 of the Civil Code is a part of the substantive law of the land, and establishes and declares a legal duty of the parent to maintain their children who are within its provisions, and establishes the right in such children to have such maintenance. As the duty runs to the children, the latter are the persons to whom the right imposed by the duty accrues; and they are the proper parties to an action to enforce such right and compel the performance of such duty. We do not see that any controlling difficulty arises out of the suggestion of appellant that after the entry of such a judgment as is contemplated in this case, and after the time for appeal shall have expired, a change of circumstances might occur by the plaintiff becoming financially able to care for himself, or the defendant becoming financially unable to comply with the judgment, and yet the judgment must stand as originally rendered. A court of equity has wide power as to the forms of its judgments, and in a case like the one at bar there could be no valid objection to the reservation in the judgment of the power to modify it in the event that changed conditions in the future should justly demand a modification. And with respect to judgments enforcing duties and rights growing out of the domestic relations the very nature of the judgment requires that there should be a reserved power to meet future exigencies. Our conclusion is that the duty and right established by section 206 of the Civil Code may be enforced by an action in equity like the one at bar, and that in such action a court of equity has full jurisdiction to pronounce a judgment such as is prayed for in the complaint.

As we have occupied considerable space in discussing the main and most important point in the case, we will very briefly notice the other contentions of appellant.

The court having, as we have seen, jurisdiction to enforce the provisions of section 206, it had power to make all orders necessary for that purpose, including the orders for suit money, counsel fees, and maintenance *pendente lite*; and the amounts allowed for such purposes were not excessive.

There was sufficient evidence to sustain the finding of appellant's financial ability to comply with the preliminary order to pay money *pendente lite*, and with any reasonable

final judgment that may be made; and the evidence introduced by respondent showed such ability was not erroneously admitted.

The motions for a change of venue were properly denied, as the defendant Bessie, whose residence was in the county where the action was commenced, was a proper party, and she did not join in the motion.

The plea in abatement on the ground of the pendency of another action was not maintainable.

There are no other points in the case which are tenable, or which call for special notice.

The points above noticed are the same as those arising in the case of *Roma Paxton v. Blitz and Bessie Paxton*, the only difference in the two cases being in the reasons given by Roma why she is unable to support herself, although she also fully brings herself in that regard within the provisions of said section 206.

All and each of the four orders appealed from are affirmed.

Henshaw, J., and Lorigan, J., concurred.

Hearing in Bank denied.

[L. A. No. 1666. Department Two.—March 15, 1907.]

T. KATAOKA, Appellant, v. J. W. HANSELMAN,
Respondent.

REOPENING CASE—CONFLICTING EVIDENCE—APPEAL.—A motion to reopen the case, made upon conflicting affidavits, is addressed to the discretion of the trial court, and its action thereon will not be interfered with on appeal.

Id.—NEWLY DISCOVERED EVIDENCE—NEW TRIAL.—The refusal of the trial court to grant a motion for a new trial upon the ground of newly discovered evidence will not be interfered with on appeal when the evidence submitted on the motion is conflicting or the alleged new evidence was merely cumulative.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial.
M. T. Allen, Judge.

The facts are stated in the opinion of the court.

John W. Kemp, for Appellant.

Davis, Rush & Willis, for Respondent.

McFARLAND, J.—The justices of the district court of appeal of the second appellate district, to which this cause had been appealed, not being able to unanimously agree in a judgment, filed their opinions, and the cause was transferred to this court. In the district court a majority of the justices concurred in the following opinion:—

“The suit was brought on a contract between the defendant and plaintiff set out in the complaint; by the terms of which the plaintiff agreed, in effect, to cultivate certain lands of the defendant planted to beets and load the beets into wagon as instructed by the latter or his agents, at the agreed price of one dollar per ton for the beets taken from land yielding seventeen tons or more per acre, and \$1.25 per ton for beets taken from land yielding or producing less than seventeen tons, etc.

“The following clauses bearing upon the questions involved in the case are contained in the agreement:—

“‘The party of the first part agrees that all land planted and handled by them and described as follows:—

No. 1.....	85 acres
No. 2.....	1.10 acres
No. 3.....	15 acres
.....	acres

containing in all 2.10 acres, more or less, is to be cared for by the party of the second part, T. Kataoka.’

“‘Payments are to be made three times in order of the described and as follows, if required by party of the second part, at the rate of four dollars (\$4.00) per acre after thinning is done, and after the field is laid by, that is, when the beets have been hoed not less than two times, and are free from weeds, an additional two dollars (\$2.00) per acre will be made, the balance remaining due to be paid after all work is finished in accordance with this agreement.’

“It may be assumed that the decimal points in the former of the two paragraphs quoted were inadvertently inserted, and that the number of acres intended to be described was 210.

"It is further alleged that the plaintiff has duly performed all the conditions of the contract, and that upon its completion there was due to him the sum of \$3,431.87; of which amount there has been paid to him the sum of \$2,904.25, leaving due the sum of \$527.12. The defendant in his answer denies that upon the completion of the contract there was due to the plaintiff any sum greater than \$2,934.25; of which amount it is alleged he had paid the sum of \$2,904.25, leaving due to the plaintiff the sum of thirty dollars only, which, he alleges, he tendered to the plaintiff. This allegation and denial constitutes the only issue in the case; and on this issue the court finds for the defendant. Judgment was entered accordingly, from which and an order denying his motion for a new trial plaintiff appeals.

"After both sides had rested and the case was closed, and judgment ordered for the plaintiff for the sum of thirty dollars, a motion was made by the plaintiff on affidavit to reopen the case for the purpose of introducing the additional evidence therein referred to; but this motion was denied by the court, and thereupon its findings of fact and judgment were filed.

"The grounds urged by the plaintiff for reversal are, that the court erred in denying the plaintiff's motion to reopen the case, and in refusing to grant a new trial upon the ground of newly discovered evidence; and that the finding of the court upon the issue involved is not sustained by the evidence.

"As to the last ground stated, it is sufficient to say that the evidence taken at the trial is conflicting, with the large preponderance thereof going to support the decision of the trial court.

"The motion to reopen the case for further evidence was made several months after the case had been tried and decided. The showing made consisted of several affidavits filed by plaintiff and several affidavits filed on the part of the defendant in rebuttal. There was no objection made to the filing or consideration of these affidavits in rebuttal. The evidence given on this motion was just as conflicting in its nature and was exactly of the same general character and directed to the same proposition as had been the evidence taken upon the trial. It was affirmed on the one side and denied under oath on the other that an agreement had been made between the parties that the acreage grown to beets was

one hundred and sixty-six. It was shown by plaintiff that after the trial he had another engineer measure the beet ground, and that this measurement showed that the previous measurement by defendant's engineer was wrong, and that there was considerably above one hundred and sixty-six acres grown to beets. On the other hand, several disinterested witnesses gave their affidavits to the effect that plaintiff's engineer had included in his measurement 'many acres' that were not grown to beets. The motion to reopen, as well as the motion for a new trial, being submitted to the court upon this conflicting evidence, of course he would not grant either motion unless he believed the affidavits of the plaintiff to be true. We must presume in support of the action of the court that he did not so believe them, and as the whole matter was within his discretion, he being the judge of the value and effect of the evidence, we are not authorized to interfere with his decision.

"Moreover, the alleged new evidence was merely cumulative, and for that reason also the reopening, rehearing, and retrial were properly refused. (*Patterson v. San Francisco etc. Co.*, 147 Cal. 178, [81 Pac. 531].)

"The judgment and order appealed from are affirmed.

"GRAY, P. J.

"I concur: Allen, J."

After a full consideration of the case here we are satisfied with the foregoing opinion and with the conclusions therein reached, and for the reasons therein given, the judgment and order appealed from are affirmed.

Henshaw, J., and Lorigan, J., concurred.

[L. A. No. 1557. In Bank.—March 19, 1907.]

W. E. YOULE, Respondent, v. MARY J. THOMAS, Respondent; T. P. ROSS, Intervener and Appellant.

[L. A. No. 1558.]

W. E. YOULE, Respondent, v. MARY J. THOMAS, Respondent; JOSEPH HART, Intervener and Appellant.

[L. A. No. 1559.]

W. E. YOULE, Respondent, v. MARY J. THOMAS, Respondent; L. G. WORDEN, Intervener and Appellant.

[L. A. No. 1560.]

W. E. YOULE, Respondent, v. MARY J. THOMAS, Respondent; JAMES F. PECK, Intervener and Appellant.

[L. A. No. 1561.]

W. E. YOULE, Respondent, v. MARY J. THOMAS, Respondent; LAURA FUSTCORN, Intervener and Appellant.

[L. A. No. 1562.]

W. E. YOULE, Respondent, v. MARY J. THOMAS, Respondent; CORWIN RADCLIFFE, Intervener and Appellant.

[L. A. No. 1563.]

W. E. YOULE, Respondent, v. MARY J. THOMAS, Respondent; W. G. DEAL, Intervener and Appellant.

[L. A. No. 1564.]

W. E. YOULE, Respondent, v. MARY J. THOMAS, Respondent; A. L. KING, Intervener and Appellant.

[L. A. No. 1565.]

ALBERT R. WILKES, Respondent, v. MARY J. THOMAS, Respondent; J. D. BRADLEY, Intervener and Appellant.

[L. A. No. 1566.]

ALBERT R. WILKES, Respondent, v. MARY J. THOMAS, Respondent; Dr. MARCHUS, Intervener and Appellant.

[L. A. No. 1567.]

ALBERT R. WILKES, Respondent, v. MARY J. THOMAS, Respondent; ORLA CASAD, Intervener and Respondent.

[L. A. No. 1568.]

ALBERT R. WILKES, Respondent, v. MARY J. THOMAS, Respondent; R. W. BERGEREN, Intervener and Appellant.

[L. A. No. 1569.]

ALBERT R. WILKES, Respondent, v. MARY J. THOMAS, Respondent; M. D. WOOD, Intervener and Appellant.

[L. A. No. 1570.]

ALBERT R. WILKES, Respondent, v. MARY J. THOMAS, Respondent; J. W. SCOTT, Intervener and Appellant.

[L. A. No. 1571.]

ALBERT R. WILKES, Respondent, v. MARY J. THOMAS, Respondent; LOUIS SIEDENBERG, Intervener and Appellant.

[L. A. No. 1572.]

ALBERT R. WILKES, Respondent, v. MARY J. THOMAS, Respondent; FRANK J. SOLINSKY, Intervener and Appellant.

STATE LANDS—CONTEST OF RIGHT OF PURCHASE—INTERVENTION.—*Youle v. Thomas*, 146 Cal. 537, [80 Pac. 714], affirmed on the proposition that where the state surveyor-general has referred a contest of the right of purchase of state lands the jurisdiction of the court is special and limited, and the sole matter to be determined is the question of the right of the two parties between whom the contest arose in relation to the land, and other persons, each claiming as an applicant for the purchase of a portion of the land under the acts for the purchase of mineral lands, have no right to intervene in the contest.

APPEALS from judgments of the Superior Court of Kern County. M. L. Short, Judge.

The facts are stated in the opinion of the court and in the opinion in *Youle v. Thomas*, 146 Cal. 537, [80 Pac. 714].

James F. Peck, Solinsky & Wehe, and Charles C. Boynton, for Appellants.

Laird & Packard, Galpin & Bolton, T. M. McNamara, and Charles G. Lamberson, for Respondents.

HENSHAW, J.—For the facts of these cases reference is made to *Youle v. Thomas*, 146 Cal. 537, [80 Pac. 714]. W. E. Youle contested the right of defendant Thomas to purchase the north half of the section for which she had made application and held the certificate of purchase. Albert R. Wilkes in like manner contested her right to purchase the south half. These appellants are the interveners who, as noted in *Youle v. Thomas*, by leave of court filed complaints in intervention, each claiming as an applicant for the purchase of a forty-acre tract under the acts for the purchase of mineral lands. When the case came on for trial the court on motion dismissed these sixteen complaints in intervention, and the interveners appeal. *Youle v. Thomas*, above cited, dealt with the right of the intervener Clarke to be heard in the contest between Youle and Thomas. The same proposition that was presented in that case touching the intervener Clarke is here presented in but slightly changed form in regard to these appellants. The reasoning adopted and the conclusion reached in that case are strictly applicable to the present cases. No elaboration of the views expressed in *Youle v. Thomas* is called for. As under no circumstances would these interveners have been entitled to litigate in the contest between Youle and Thomas, or *Wilkes v. Thomas*, it follows that they were not aggrieved by the orders and judgments dismissing their complaints in intervention, which orders and judgments are therefore affirmed.

Shaw, J., Angellotti, J., McFarland, J., Sloss, J., and Lorigan, J., concurred.

Rehearing denied.

[L. A. No. 1703. In Bank.—March 20, 1907.]

W. M. WRIGHT, Respondent, v. EDWIN R. FOX, Defendant and Appellant, and J. M. ELLIOTT et al., Defendants.

TAXATION—ASSESSMENT OF CITY LOTS—FAILURE TO DESIGNATE CITY.—Under subdivision 3 of section 3650 of the Political Code an assessment of land, as follows:—

“In Los Angeles County.		In Jefferson St.
City or Town Lots		
Lot	Block	
5	3	
6	3”	

which entirely fails to designate the city or town, and which is unaided by reference to any map, plat, or tract, is void, and all subsequent proceedings, and the deed made thereunder, are likewise void.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Cole & Cole, for Appellant.

O. B. Carter, for Respondent.

HENSHAW, J.—Plaintiff brought this action to quiet title in himself against the defendant Edwin R. Fox and others to certain pieces of land. All the defendants save defendant Fox made default. Fox answered, denied plaintiff's title, and asserted title in himself, his claim of title being based on tax-deeds which he offered in evidence. To the introduction of these plaintiff objected, upon the ground they were irrelevant, immaterial, and incompetent. It was stipulated that if the defendant failed to establish title in himself by virtue of the tax-deeds, then title was in plaintiff and the decree should be given accordingly. The court found the invalidity of the tax-deeds and rendered its decree quieting title in plaintiff's favor. Defendant Fox moved for a new trial, and

his motion being denied, appeals from the judgment and from that order.

Section 3650 of the Political Code requires the assessor to prepare an assessment-book with appropriate headings, in which must be listed all property within the county, under the appropriate head. The assessment in this case is in the following language:—

“In Los Angeles County.		In Jefferson St.
City or Town Lots.		
Lot	Block	
5	3	
6	3”	

It would seem to be an assessment drawn under subdivision 3 of section 3650 of the Political Code,—that is to say, an assessment of city and town lots. So regarded, it fails to designate the city or town. It describes property as being in the county of Los Angeles, in some city or town, and upon Jefferson Street therein, lot 5 in block 3. Not only is no effort made to aid this description by references to map, plat, or tract, but we are advised by appellant that the land was not within the corporate limits of any city or town. We then have extra-urban land assessed as being lot 5, block 3, in Jefferson Street, a description which of course is fatally and radically defective. (*Labs v. Cooper*, 107 Cal. 656, [40 Pac. 1042]; *Miller v. Williams*, 135 Cal. 183, [57 Pac. 788].) This is not at all the case presented in *Baird v. Monroe*, ante, p. 560, [89 Pac. 352], decided by this court on February 16, 1907, first, because here there was no attempt to aid the assessment by evidence, and, in the second place, this assessment pretends to fix property, not as in any tract, but as in Jefferson Street; so it would seem impossible, even if the effort had been made, to aid so defective a description by evidence of a map.

The assessment being thus void, all subsequent proceedings, and the deed made thereunder, are likewise void. (*Grotefend v. Uitz*, 53 Cal. 666; *Greenwood v. Adams*, 80 Cal. 74, [21 Pac. 1134]; *Dranga v. Rowe*, 127 Cal. 506, [59 Pac. 944].) The conclusion thus reached renders unnecessary a consideration of any of the further propositions of respondent against the sufficiency of the tax-deed.

For the foregoing reason the judgment and order appealed from are affirmed.

McFarland, J., Angellotti, J., Sloss, J., Shaw, J., and Lorigan, J., concurred.

Rehearing denied.

[L. A. No. 1821. In Bank.—March 21, 1907.]

**In the Matter of the Estate of ROSARIO DE CIGARAN,
Deceased.**

SUCCESSION FROM ILLEGITIMATES—CONSTRUCTION OF SECTIONS 1388 AND 1386 OF CIVIL CODE.—Section 1388 of the Civil Code, which prior to its amendment provided “if an illegitimate child, who has not been acknowledged or adopted by his father, dies intestate, without lawful issue, his estate goes to his mother, or in case of her decease, to his heirs at law,” established the rule of succession to the whole estate of an illegitimate, not acknowledged or adopted by his father, who dies intestate without lawful issue, except in so far as it may be qualified by section 1387 of that code; and this rule, being contrary to the general rules of succession prescribed by section 1386, must prevail over anything contained in that section, as that section, by its express terms, is limited to cases not otherwise expressly provided for.

Id.—SUCCESSION BY HEIRS OF MOTHER OF ILLEGITIMATE—SURVIVING HUSBAND EXCLUDED.—Under section 1388 of the Civil Code, where an illegitimate woman who had never been acknowledged or adopted by her father dies intestate without issue, leaving a husband her surviving, her entire separate property is succeeded to by the heirs at law of her mother to the exclusion of her surviving husband.

Id.—SUCCESSION BY ILLEGITIMATE HALF-SISTER OF ILLEGITIMATE.—Under section 1387 of the Civil Code an illegitimate child is an heir of his mother, and where an illegitimate woman, who had never been acknowledged or adopted by her father, dies intestate without issue, leaving surviving a husband, and an illegitimate half-sister by another father, as the sole heir at law of her mother, her entire separate estate is succeeded to by her illegitimate half-sister, to the exclusion of her surviving husband.

Id.—LEGISLATURE DETERMINES SUCCESSION.—The question as to whether a surviving spouse of an illegitimate should inherit is one solely for the legislature, and the courts cannot substitute their own views thereon for the views of the lawmaking power.

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

H. H. Appel, Henry T. Gage, and W. I. Foley, for Appellant.

J. Wiseman McDonald, for Respondent.

ANGELLOTTI, J.—This is an appeal from the judgment given in a proceeding brought under section 1664 of the Code of Civil Procedure to have determined the rights of all persons to the estate of Rosario de Cigaran, deceased.

There is no dispute as to the material facts, which are as follows: Deceased died intestate. She was an illegitimate child, and had never been acknowledged or adopted by her father. At the time of her death, she was the wife of Vicente de Cigaran, who survives her. She died without issue, legitimate or illegitimate. There also survived her one Mrs. Refugio Padilla, who was also an illegitimate daughter of the mother of deceased, by a different father, and who likewise had never been adopted or acknowledged by her father. The mother of these illegitimates died prior to the death of deceased, having never been married, and, so far as appears, leaving no issue other than decedent and Mrs. Padilla. All the property of the deceased was her separate property, she having owned the same prior to her marriage. The only claimants of the estate, or any interest therein, are the surviving husband and Refugio Padilla. The judgment of the lower court awarded the whole estate to the surviving husband, and Refugio Padilla appeals therefrom.

The questions presented by this appeal turn upon the proper construction of various provisions of our statutes relating to succession as the same existed at the date of death of the deceased, certain of said provisions having been amended since the death of deceased.

Respondent bases his claim on subdivision 5 of section 1386 of the Civil Code, the general section relating to the succession to the property of intestates. That subdivision was as follows: "If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife." The theory of respondent in this regard is that appellant, by reason of ille-

gitimacy, was not a sister or half-sister of deceased within the meaning of said section 1386. If this theory be well founded, as we think it is, there could, of course, be no question as to respondent's right under this provision of law to succeed to the entire estate, were it not for the illegitimacy of the deceased. The principal question on this appeal is as to the effect of this illegitimacy.

By the express terms of section 1386 of the Civil Code the rules of succession therein laid down are applicable only "unless otherwise expressly provided for in this code and the Code of Civil Procedure." Under this language in the general section, whenever different rules are laid down for special cases, those rules are paramount to the general rules of section 1386 of the Civil Code, and this is so whether or not such section can be construed as having any direct reference to the estates of illegitimates in the absence of provision therefor elsewhere.

Section 1388 of the Civil Code, which is the only provision of our law referring *in terms* to succession to property of illegitimates, provided as follows: "If an illegitimate child, who has not been acknowledged or adopted by his father, dies intestate, without lawful issue, his estate goes to his mother, or in case of her decease, to her heirs at law." This section provides a rule of succession for a special case, and must govern in every such case, notwithstanding anything to the contrary contained in section 1386 of the Civil Code. It is upon this section that appellant bases her claim. The mother of deceased being dead, she claims the estate of deceased as her mother's heir at law.

There can be no doubt that the facts of this case bring it within the provisions of this section, if they be taken literally and construed without reference to any other provision of the law. Deceased was an illegitimate child, she had not been acknowledged or adopted by her father, she died intestate, and she died without issue of any kind, legitimate or illegitimate. Her mother had died before her. Appellant was sole heir at law of the mother of deceased, by reason of section 1387 of the Civil Code. That section declares: "Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child: and in all cases is an heir of his

mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock." Such mother not having left a husband surviving, her surviving issue, if legitimate, would have taken her (the mother's) whole estate under subdivision 1 of section 1386 of the Civil Code, and as section 1387 put appellant in the same position, so far as the right to inherit is concerned, as if "born in lawful wedlock," she, as the only child, was the mother's sole heir at law. The contention that the further provision of section 1387, that such illegitimate child, although in certain cases the heir of his father, and in all cases the heir of his mother, "does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family," precludes appellant from taking the estate of her deceased illegitimate half-sister as the heir of her mother, is answered by the decision of this court in *Estate of Magee*, 63 Cal. 414, where the same question was directly involved. There the deceased, Suez, who was illegitimate, died after her mother, Susan. There had been another illegitimate daughter of Susan, Elizabeth, who also died before Suez, leaving a legitimate son. It was held that this son, as the lawful issue of the deceased illegitimate Elizabeth (who, by section 1387, was the heir of her mother, as if born in lawful wedlock), took the whole estate as against the legitimate children of Eliza, a deceased sister of the mother, Susan, not "perhaps" as heir of the deceased, Suez, but as heir of Susan, the mother of deceased. (Civ. Code, sec. 1386, subd. 1.) Referring to the proviso last quoted from section 1387 of the Civil Code, the court said: "This proviso does not apply to the case before us. If Eliza, the other daughter of Sabra, the common ancestor, had died leaving estate, the illegitimate children of Susan (Elizabeth or Suez), or their descendants, could not have represented Susan for the purpose of inheriting from Eliza; Eliza's estate would rather have escheated. We think the word 'kindred' used in the above-quoted clause relates to the kindred referred to in section 1386, meaning lawful kindred. . . . By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate,

unless a different contention is clearly manifest. (Citing authorities.) In using the word 'kindred' in section 1387, the legislature intended to preclude from the general words preceding it the construction that an illegitimate might by representation inherit from those whom the common law or section 1386 acknowledges as kindred." This case is conclusive upon the proposition that appellant was entitled to take, as her mother's sole heir at law, whatever of the estate of deceased such mother would have taken under section 1388, had she survived deceased.

It would appear, therefore, that under the express terms of section 1388 of the Civil Code appellant is entitled to the whole estate of deceased, to the exclusion of the surviving husband. Respondent contends that section 1388 was never intended to exclude the surviving husband or wife of an illegitimate, and that construing it in connection with sections 1386 and 1387 of the Civil Code, it is clear that section 1388 was intended to be operative only in the absence of surviving spouse and issue. We can see no sound basis for such contention, even granting, as we are inclined to do, contrary to views expressed in the *Estate of Magee*, 63 Cal. 414, which were *obiter dicta*, that section 1386 does apply to the estates of illegitimates in the absence of contrary provision elsewhere, and that sections 1387 and 1388 of the Civil Code do not make complete provision as to illegitimates so far as the legislature has seen fit to declare.

The language of section 1388 of the Civil Code is such that, even when considered in connection with sections 1386 and 1387, it would not permit a construction making it anything else than the rule of succession applicable as to the *entire estate* of the illegitimate not acknowledged or adopted by his father, who dies intestate, without lawful issue. The rule prescribed is utterly at variance with that contained in subdivision 2 of section 1386, where it is declared "if the decedent leaves no issue, the estate goes one half to the surviving husband or wife, and the other half to the decedent's father and mother," etc., while here, if he dies without lawful issue, "*his estate goes to his mother*," etc. (The italics are ours.) It is also directly opposed to the rule declared in subdivision 5 of section 1386 of the Civil Code, upon which respondent relies, and which has already been quoted. By express provision

of section 1386 of the Civil Code that section is applicable only in the absence of express provision otherwise elsewhere. The legislature saw fit to prescribe in section 1388 the absence of lawful issue of the illegitimate as the sole condition precedent to the succession of the mother, or, in case of her death, the mother's heirs, *to the whole estate*. It will be observed that if respondent's theory as to the effect of section 1386 be correct, the lawful issue of such an illegitimate was, equally with the surviving spouse, protected by such section from the application of section 1388 of the Civil Code, even if not mentioned therein, and yet provision was expressly made as to it in section 1388, while no mention was made as to a surviving spouse. Having in mind the possibility of marriage on the part of the illegitimate, as is shown by this provision as to lawful issue, the legislature must also be presumed to have had in mind the possible survival of the other spouse, and its omission to specify his or her failure to survive as a condition precedent to the application of the rule must be deemed to have been intentionally made.

It is urged that, construing section 1388 according to its terms, a conflict is apparent between it and section 1387, in that, by section 1387 an illegitimate "in all cases is an heir of his mother," while by section 1388, in the absence of "lawful issue," the estate of an illegitimate goes to his mother, or, in case of her decease, to her heirs at law. Thus, it is said, where both the mother and the child are illegitimate, section 1387 makes the child the heir of his mother, while section 1388, taken alone, excludes him, and this is urged as a reason for such a construction of section 1388 as would make it subject to the provision of section 1386 and 1387, so far as the rights of the surviving spouse and children are concerned. But we do not think that sections 1387 and 1388 are in conflict upon the point suggested. If they can be reasonably so construed as to avoid such a conflict, that construction must, of course, be adopted. Either section 1387, which has to do solely with the right of illegitimates to inherit, is to be construed as applicable only to inheritance by an illegitimate from a parent who is legitimate, or, for purposes of inheritance, the illegitimate child, by reason of section 1387 of the Civil Code, is to be held to be within the term "lawful issue," as that term is used in section 1388 of the

Civil Code. (See *Estate of Wardell*, 57 Cal. 484; *Cherry v. Mitchell*, 108 Ky. 1, [55 S. W. 689]; *In re Gorkou's Estate*, 20 Wash. 563, [56 Pac. 385]; *Marshall v. Wabash R. Co.*, 120 Mo. 275, [25 S. W. 179]; *Bennett v. Toler*, 15 Gratt. 588, [78 Am. Dec. 638].)

The language of section 1388 is plain and unambiguous. But one effect can be given to it if we take it as it is, and this we are compelled to do. The intention of the lawmaking power must be ascertained solely from the language it has used, where that language is so plain that it permits of but one construction, and the result of that construction is not so absurd as to make it manifest that it could not have been intended. Certainly, we cannot say that the exclusion of the surviving spouse from participation in the estate of a deceased husband or wife, even under the circumstances here appearing, is such a result, however unjust or improper it may be. The question as to whether such a surviving spouse should inherit is one solely for the legislature, and the courts cannot substitute their own views thereon for the views of the lawmaking power. In *Estate of Ingram*, 78 Cal. 586, [12 Am. St. Rep. 80, 21 Pac. 435], the question was as to the right of the children of the deceased brother or sister to take as against the surviving husband, there being no issue, father, mother, brother, nor sister. Under subdivision 2 of section 1386, such children were entitled to their deceased parent's share where there was also a surviving brother or sister of the deceased, but subdivision 5 of section 1386, which has been before quoted herein, declared that the whole estate goes to the surviving husband or wife, "if the decedent leaves a surviving husband or wife and neither issue, father, mother, brother, nor sister," making no provision as to a child of the deceased brother or sister. It was held that the husband was entitled to all. The court said: "It is vain to argue against the injustice of the rule, or to contend that in a case like the one at bar the children of a deceased *ought* to have a share in the estate when there is not any surviving brother or sister, as well as when there *is*. Succession to estates is purely a matter of statutory regulation, which cannot be changed by courts." (See, also, *Estate of Carmody*, 88 Cal. 616, 620, [26 Pac. 373].) This is clearly in point here. We may not be able to see any good reason for the exclusion of the surviving spouse

of the illegitimate where she dies without lawful issue, and the giving of the estate to the mother or her heirs in preference to such spouse, but that fact is immaterial where the legislature has said in unmistakable terms that it shall so be. That it did so say by section 1388 we can have no doubt.

Our conclusion is that section 1388 provides the rule of succession as to the whole estate of an illegitimate, not acknowledged or adopted by his father, who dies intestate, without lawful issue, except in so far as it may be qualified by section 1387 of the Civil Code, and that this rule, being contrary to the general rules of succession prescribed by section 1386, must prevail over everything contained in that section. The case here is one where, in the language of section 1386, it has been "otherwise expressly provided," and by the express terms of such section it has no application here.

It should be observed that what we have said has reference solely to the separate property of the deceased husband or wife. Section 1400 of the Civil Code provides that the preceding sections, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents, and sections 1401 and 1402 of the Civil Code purport to provide the rules as to community property.

The judgment of the superior court is reversed and the matter remanded for such further proceedings as are not inconsistent with the views herein expressed.

Shaw, J., McFarland, J., Henshaw, J., Lorigan, J., Sloss, J., and Beatty, C. J., concurred.

Rehearing denied.

[L. A. No. 1555. In Bank.—March 21, 1907.]

CHARLES HENDERSON, Appellant, v. LOS ANGELES TRACTION COMPANY (a Corporation), Respondent.

NEGLIGENCE—STREET RAILWAY—ORDINARY CARE REQUIRED.—The operator of a street railway is only required to use ordinary care and caution in the management and operation of its cars to avoid inflicting injury upon a person traveling upon or using the street upon
CL Cal.—44

which the cars are being operated. Ordinary care is that degree of care which a person of ordinary prudence would use under the same or similar circumstances. The standard by which such degree of care is to be measured is not absolute, but varies with the circumstances attending the operation of the cars, such as the character of the cars, the agency of propulsion, the locality in which they are operated, whether in the country or in a city, whether over much-traveled or unfrequented streets, and the possibility or probability attending their operation.

ID.—INSTRUCTIONS—APPLICATION TO EVIDENCE.—Where the court correctly instructs the jury as to the duty of a street-railway company to use ordinary care in the operation of its cars it cannot be assumed on appeal that the jury were unable to apply the instruction to the facts and circumstances of the case. It is to be assumed that the jury understood the instruction and applied it to the evidence, and if the appellant thought the instruction was too general, he should have presented more definite and specific instructions.

ID.—CONTRIBUTORY NEGLIGENCE—COLLISION WITH WAGON.—In an action against a street-railway company to recover damages for personal injuries resulting from a collision between a wagon in which the plaintiff was sitting and an electric car operated by the defendant, it is proper to instruct the jury that "in determining whether or not the plaintiff was negligent you should consider whether or not under all the circumstances of the case it was his duty, using ordinary care for his own safety, to have jumped from the wagon." Such instruction leaves the question of the plaintiff's negligence to be determined from all the circumstances in the case, and, if given, renders without prejudice the refusal to give an instruction requested by the plaintiff which referred more particularly to the circumstances to be considered by the plaintiff in determining whether he should have left the wagon or not, where the circumstances were such as jurors would naturally take into consideration whether their attention was called to them or not.

ID.—CONSTRUCTION OF INSTRUCTIONS.—In determining whether a jury has been properly instructed, the instructions, taken as a whole, must be considered, and if, when the entire charge is examined, the omissions or inaccuracies in a particular instruction appear to have been supplied, and the jury fairly and consistently instructed generally as to the law, this is sufficient to defeat any claim of error predicated on defects in particular instructions.

ID.—LAST CLEAR CHANCE.—In such an action, the plaintiff tendered an instruction which in effect informed the jury as to the care to be exercised by the defendant in the ordinary operation of its cars, and that it would be liable to plaintiff for injury resulting to him by reason of its negligence, "*and not by reason of his own negligence.*" The court gave the instruction as tendered, substituting for the italicized words the following: "unless you find that the plaintiff was negligent and that such negligence contributed to such

injury." *Held*, that the instruction was not intended as a statement of the doctrine of the "last clear chance," and that the omission of the word "proximately" before the word "contributed" in the substituted clause did not render it erroneous, where other instructions clearly stated the rule as to the duty of the employees of the defendant to avail themselves of the last clear opportunity to avoid injuring the plaintiff after discovering his peril, even though such peril was occasioned by his own contributory negligence.

APPEAL from an order of the Superior Court of Los Angeles County refusing a new trial. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

D. M. Hammack, and Hunsaker & Britt, for Appellant.

E. E. Milliken, and E. W. Camp, for Respondent.

LORIGAN, J.—This action was brought to recover damages for personal injuries sustained by plaintiff through a collision between an electric car of defendant and a wagon in which plaintiff was seated. The jury returned a verdict for defendant, and plaintiff appeals from an order denying his motion for a new trial.

Plaintiff, a plumber's helper, twenty-three years of age, who was accustomed to and understood the driving and handling of horses, on the morning of July 2, 1901, accompanied his employer in an ordinary one-horse uncovered plumber's wagon to a residence on the west side of Georgia Street, in the city of Los Angeles, which his employer entered to examine its plumbing, leaving plaintiff in charge of the horse and wagon. Georgia Street is a street forty feet wide between the curbs, running in a northerly and southerly direction, and defendant on the day of the collision operated a double-track electric railway over it, the distance between the curb and the west side of defendant's track being thirteen feet. The residence at which they called was on Georgia Street, between Fifteenth and Sixteenth streets, and soon after his employer had gotten out of the wagon and entered the house plaintiff, on account of a fear entertained by him that the horse would become frightened by the cars of defendant moving along Georgia Street, drove off of that street on to Fifteenth Street,

remained there some time, and then drove back and again took up his position in front of the residence where his employer was engaged. When plaintiff returned he drove up close to the west curb of the street, the rear end of the wagon being nearer to the track of defendant than its front; the horse faced north, and the plaintiff sat in the wagon holding the lines. This was the situation when a car of defendant approached traveling from the north along Orchard Street towards the point where plaintiff was stationed and where the collision occurred.

As to such collision. According to the testimony of plaintiff he first discovered the approach of the car which occasioned it when distant a little more than three hundred feet from him; that it was then moving towards him on the west track at a high rate of speed; that when it approached to within something over two hundred feet from where he was the horse he was holding became restless and commenced backing; that despite plaintiff's efforts to prevent it the horse backed the rear right wheel of the wagon on the west track of defendant's road, where it was struck by the car, causing plaintiff to be thrown out of the wagon to the ground and injured; that the horse and wagon were plainly visible to the motorman of defendant from the time the car turned into Georgia Street from Thirteenth Street (several blocks away), and that the motorman made no effort to check the high rate of speed of the car until it was almost on top of the wagon. The evidence on the part of the defendant tended to show that the motorman did not discover the horse and wagon until the car was something over one hundred feet from it, and that the horse did not begin to back until the car had approached within twenty feet of him. There was some other evidence that the horse showed signs of being frightened when the car was within forty or fifty feet of him, but did not commence backing until it got nearer. There was also evidence that the car during its entire movement along Georgia Street was going at a speed of seven or eight miles an hour, and that as soon as the motorman saw the horse begin to back he applied the brakes and reversed the current, and used all available means to stop the car.

This is a sufficient statement of the evidence in the case for the purpose of considering the grounds urged by appellant

for a reversal, which are confined solely to alleged errors on the part of the trial court as to instructions.

1. It is insisted that the court erred in instructing the jury: "That it is the duty of the operator of a street railway to exercise *ordinary care* and caution in the management and operation of its car to avoid inflicting injury upon a person traveling upon or using the street upon which the car is being operated, . . ." and in refusing to give the instruction requested by plaintiff, "that the conductor and motorman in charge of the car of the defendant which collided with the wagon on which the plaintiff was seated were required to use *great care* to see that no injury was caused to persons or teams having business in the streets."

We perceive no error committed by the court in its action as to these instructions. It is not the law that in the operation of a street railroad the operator is required to use *great care* to avoid injury to persons traveling on or using the streets over which the cars are operated. The operator of a street railroad over a street, and the traveler on or person using said street, are reciprocally bound to exercise that degree of care which a person of ordinary prudence would use under the same or similar circumstances, which is ordinary care only.

This is the general rule laid down by text-writers on the subject, and we confine ourselves in the citation of authorities to the rule as applied in the operation of street railways alone. (Nellis on Street Railway etc. Law, sec. 25, p. 303; Joyce on Electric Law, sec. 575.) It is likewise the rule in jurisdictions other than our own as to the same subject. (*Pendleton Street R. R. Co. v. Shiras*, 18 Ohio St. 255; *Gorman's Admr. v. Louisville Ry. Co.*, 24 Ky. Law Rep. 1938, [72 S. W. 761]; *Stafford v. Chippewa E. R. Co.*, 110 Wis. 331, [85 N. W. 1036]; *Kube v. St. Louis Transit Co.*, 103 Mo. App. 582, [78 S. W. 55]; *Perras v. United Traction Co.*, 84 N. Y. Supp. 992, [88 App. Div. 260]; *West Chicago R. R. Co. v. Wizeman*, 83 Ill. App. 403.)

It is also the rule expressly laid down in this state. (Civ. Code, sec. 1714; *Cunningham v. Los Angeles Ry. Co.*, 115 Cal. 561, [47 Pac. 452]; *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, [98 Am. St. Rep. 85, 74 Pac. 15].)

It is insisted by appellant that the instruction tendered by him and refused, is supported by *Mock v. Los Angeles Traction Co.*, 139 Cal. 616, [73 Pac. 455]. It is true that in that case an instruction was approved which stated that ordinary care to be exercised by an electric street-car line required "great care in keeping its appliances for stopping cars in good condition." The court said: "As these cars cannot be operated upon the public street with safety unless this is done, 'ordinary prudence requires that 'great care' should be exercised in that direction." It was, however, stated by the commissioner who wrote the opinion in that case, that it was not essential to a disposition of the appeal before it that this instruction should be considered, and it was not, because the order granting a new trial was affirmed on other grounds, exclusive of any consideration of the correctness of the instruction at all. Under these circumstances the language used by the court cannot be held to be an authoritative declaration of a rule of law as to the care to be exercised in the general operation of electric-car lines, either as to the selection of appliances, or the active operation of the cars over the tracks. The rule as declared by the general authorities on the subject, and by the decisions of this court in cases involving the question as to the degree of care required, and to which we have referred, is that only ordinary care must be exercised,—that degree of care which an ordinarily prudent person exercises in the operation of electric street-car lines; and if the language used in *Mock v. Los Angeles Traction Co.*, 139 Cal. 616, [73 Pac. 455], is to be considered as laying down a different rule, the decision is to that extent erroneous and is overruled.

And as we read the other authorities cited by appellant in support of the instruction asked by it and refused, we do not understand them as laying down any different rule than that ordinary care must be exercised. They discuss and elaborate the proposition that the degree of vigilance and prudence to be exercised by one operating cars upon a street railroad depends upon the nature and character of the agencies or instrumentalities employed in their propulsion, taking into consideration the time, place, and circumstances attending their operation. They lay down the rule, the justness and soundness of which none will question, that a higher degree of vigilance and caution in order to prevent accidents to trav-

elers is exacted from those operating cars propelled by electricity than from those operating cars propelled by a less powerful agency and one more subservient to the will of the person in charge of the cars. This is in harmony with the familiar rule that the greater the danger to be apprehended the greater the vigilance to be exercised in guarding against it. But because the degree of vigilance to be exercised in the operation of the cars must be greater in the one case than in the other, it does not affect the standard under which the liability of the person operating the car is to be measured in the event of an accident.

The standard remains the same. While a less degree of watchfulness and vigilance may be required of one operating cars moved by horse-power than is required of one in control of cable cars and a still greater degree of caution and vigilance required from those in control of electric cars, still, when the question of negligence in the operation of cars by any of these different modes or agencies arises, the same standard of accountability is applied,—namely, Was ordinary care being exercised by the person in control of the car at the time when his conduct relative to its operation is under consideration? No matter by what agency the car he is operating is propelled, whether by the now practically obsolete system of horse-power, or by cable, or by electricity, he is not required, in its operation, to use the highest degree of care, nor is the duty cast on him to use great care, but he is only required to use ordinary care, and responsible only for his failure to do so.

The standard by which ordinary care is to be measured is not absolute; and in the case of the operation of street-cars it must vary with circumstances attending their operation—the character of cars, the agency of propulsion, the locality in which they are operated, whether in the county or in a city, whether over much-traveled or unfrequented streets, and the possibility or probability of danger attending their operation. Taking these circumstances into consideration, it is quite apparent that the same degree of precaution, and the same pains to avoid accidents, are not required in the movement of a horse-car as in that of an electric car. We take these systems simply as extremes for the purpose of illustration. The movement of a horse-car being comparatively slow and the car being readily in the control of the

driver, the same degree of vigilance and caution in its operation would not be required as in the case of an electric car, an instrument of greater weight and momentum, propelled with greater speed and more difficult to control. Danger is more probable in the operation of the one than in the other, and greater precautions are required to prevent injury. But these differences in the circumstances attending the operation of the cars on the different systems do not change the standard of accountability attending the operation of either. The standard to be applied when the question arises as to how either was being operated at a given time is, Was it being operated with ordinary care? The precautions which were required to be taken to comply with the standard may be greater in the one instance than in the other, but in either instance the standard is the same. In the case of the driver of the street-car the question is, considering the power by which his car was being moved and the circumstances attending his operation of it, Did he exercise that care which an ordinarily prudent man would, with the same instrumentalities and under the same or similar circumstances, have exercised? In the case of the motorman the same standard is applied,—namely, Considering the instrumentality under his control, its momentum and speed capacity, did he exercise that degree of care with it which a person of ordinary prudence would have exercised with the same instrumentality under the same or similar circumstances? In either case the question is, Was ordinary care used? This is the standard which, while the circumstances under which it is to be determined may be different, is the proper standard to be applied. Hence, when in the case at bar the court instructed the jury that in the operation of the electric car the motorman was only required to use ordinary care and caution, it stated the proper legal rule under which the liability of the defendant was to be measured.

It is insisted, however, that the definition of ordinary care as given by the court was too general, and did not tend to assist the jury in applying the particular circumstances in the case in determining whether such care had been exercised or not.

We cannot assume, however, that when the court correctly instructed as to a rule of law that the jury were unable to

apply it to the facts and circumstances surrounding the operation of the electric car and which were shown for the sole purpose of having them determine therefrom whether ordinary care was used or not. It is to be assumed that the jury understood the instruction and applied it to the evidence. If appellant thought the instruction was too general, he should have presented other instructions which in his opinion would have made it more definite and specific. Besides this, when we take into consideration all the instructions given by the court, it appears therefrom that the court did instruct the jury as to what should be considered in determining what was "ordinary care" required to be exercised by defendant. It instructed them that a person operating a street-car is bound to anticipate the presence of vehicles and pedestrians on the highway; that he should be watchful to see that the way is clear in which he is going, and regulate his speed accordingly; that a speed at the rate of eight miles an hour would be negligence unless it was a safe rate under all the circumstances; that the motorman was bound to run his car consistent with proper care for the safety of persons using the street and for the safety of plaintiff. And taking the instructions as a whole it satisfactorily appears therefrom that the jury were instructed that whether the defendant exercised ordinary care or not was to be determined by all the facts and circumstances disclosed by the evidence in the case.

2. As to the next instruction complained of. The court instructed the jury that "in determining whether or not the plaintiff was negligent you should consider whether or not under all the circumstances of the case, it was his duty, using ordinary care for his own safety, to have jumped from the wagon."

This was doubtless given in place of an instruction tendered by plaintiff. Appellant complains because the instruction which was tendered by him on the subject was refused. While, without critically examining it, it would appear that the court might have properly given the instruction as asked, still we do not see that any injury was sustained by plaintiff in modifying it, or in substituting for it the instruction given. The instruction as given left it to the jury to determine from all the circumstances in the case, whether it was the duty of plaintiff to have left the wagon to avoid injury. The

instruction tendered referred more particularly to circumstances to be considered by the plaintiff in determining whether he should have left the wagon or not. But as in any event, under either instruction, the question of negligence in this particular was left to the jury to be considered under all the facts and circumstances in the case, which under the record do not seem to be particularly complicated, and, as in the nature of things this resolved itself into a simple question of the exercise of ordinary judgment in a situation of apparent danger, we hardly think that prejudicial error can be predicated upon the refusal to give the instruction literally as asked, or in giving the substituted instruction. The instruction as given was proper, and the circumstance particularly referred to in the instruction tendered, which it is claimed the jury should take into consideration in determining whether it was negligence or not for the plaintiff to have remained in the wagon, were such as jurors would naturally take into consideration whether their attention was called to them or not.

3. Appellant tendered an instruction as follows: "You are instructed that a person in charge of a street-car upon a public highway is bound to anticipate the presence of other vehicles and pedestrians on such highway. The law requires that a person who is managing a street-car should be watchful to see that the way is clear in the direction in which he is going, and accordingly regulate the speed at which he is running the car; and if you find from the evidence in this case that the street-car of the defendant was being run at a rate of speed at which it could not readily and quickly be stopped should occasion require, and that such rate of speed was careless and dangerous, considering the character and location of the street and all of the surrounding circumstances, and you further find the plaintiff was injured by reason of such negligence, *and not by reason of his own negligence*, then your verdict should be for the plaintiff."

This instruction the court modified. The modification consisted of substituting for the words italicized in the instruction tendered the following: "*Unless you find that the plaintiff was negligent and that such negligence contributed to such injury,*" and as so modified was given to the jury. Appellant complains of the modification, his ground of complaint being

that in giving the instruction as modified the court ignored the principal point in the instruction as tendered, which was, that in order to relieve defendant from responsibility from its negligence, the contributory negligence of plaintiff must have been the *proximate* cause of his injury; that the word "proximately" should have been inserted before the word "contributed" in the substituted clause, in order to clearly define the negligence of plaintiff which would relieve the defendant; or to state the contention of appellant more clearly, it is insisted, that by the substitution the court eliminated from consideration by the jury the doctrine of the "last clear chance," which, formulated, is that even assuming the negligence of plaintiff contributed to the injury of which he complains, still if, after the occurrence of such contributory negligence, the employees of defendant saw the dangerous condition in which plaintiff was placed, and by the exercise of ordinary care could have stopped the car and so have avoided injuring him, and failed to do so, the defendant is responsible.

It will be perceived, as far as the insertion of the words "proximate" or "proximately" is concerned, that neither of these words is used in the instruction as tendered by appellant and he can hardly be heard to complain that the court was not more accurate in framing the modification than plaintiff was in framing the tendered instruction. In other parts of the charge the jury were clearly instructed that in order to avail itself of the defense of contributory negligence on the part of plaintiff, it was necessary for defendant to show that such negligence contributed *proximately* to his injury. In determining whether a jury have been properly instructed as to the law, the instructions taken as a whole must be considered. Where numerous instructions are given (as in this case) it may well be that some particular instruction fails to contain a complete or accurate statement of the law. If, however, when the entire charge is examined the omissions or inaccuracies in a particular instruction appear to have been supplied, and the jury fairly and consistently instructed, generally, as to the law, this is sufficient to defeat any claim of error predicated on defects in particular instructions. (*Stevenson v. Southern Pacific Co.*, 102 Cal. 143, [34 Pac. 618, 36 Pac. 407]; *Dolan v. Sierra Ry. Co.*, 135 Cal. 435, [67 Pac.

686]; *Anderson v. Seropian*, 147 Cal. 201, [81 Pac. 521].) Aside from this, however, it is quite apparent from a mere reading of the instruction tendered that it was not formulated upon the theory that there was thereby being submitted to the jury the doctrine of the "last clear chance." That doctrine is capable of very simple and clear expression in an instruction. There is, however, not one word in the tendered instruction which even remotely or suggestively pretends to declare it; nothing declaring (as the instruction would if it was so contemplated) that notwithstanding the jury might find the plaintiff was guilty of contributory negligence, yet, if they found that the motorman perceived the dangerous situation in which plaintiff was placed in sufficient time by the exercise of ordinary care to have stopped the car and so have avoided injury to the plaintiff, and failed to do so, the defendant was liable. The instruction, it is clear to us, as it must have been to the trial court, was intended to inform the jury as to the care to be exercised by the defendant in the ordinary operation of its car, and its liability to plaintiff for injury resulting to him in such operation, through want of ordinary care on the part of defendant, without fault of plaintiff. That this was the purpose of the instruction is further confirmed by the fact that an instruction was tendered by plaintiff, and given by the court, clearly and specifically stating to the jury the rule as to the duty of the employees of the defendant to avail themselves of the last clear opportunity to avoid injuring plaintiff after discovering his peril, even though such peril was occasioned by his own contributory negligence.

There are no other points made by appellant as to the instructions which we think merit any discussion.

The order appealed from is affirmed.

Shaw, J., Henshaw, J., Sloss, J., Angellotti, J., and McFarland, J., concurred.

[L. A. No. 1491. In Bank.—March 25, 1907.]

ALBERT HUTSON et al., Respondents, v. SOUTHERN CALIFORNIA RAILWAY COMPANY, Appellant.

NEGLIGENCE—RAILROAD-CROSSING—DUTY OF TRAVELER—INSTRUCTIONS.

—In this state a person approaching a railroad-crossing is not authorized to assume that the persons operating a train will not in any way be negligent in that operation, and an instruction assuming the contrary is erroneous. Such crossing, from its very nature, is always a place of danger, and a traveler has no right to omit any of the care which the law demands of him, upon the assumption that due care will be exercised in the operation of the train.

ID.—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.—In an action against a railroad company to recover damages for personal injuries caused by its negligence, the burden of proving contributory negligence rests upon the defendant. The weight of the evidence or preponderance of probability is sufficient to establish that fact, and an instruction to the jury that such defense should be proved "*to your satisfaction* by a preponderance of the evidence," should omit the italicized words.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

L. J. Norton, E. W. Camp, Paul Burks, and E. E. Milliken, for Appellant.

J. H. Merriam, and Hunsaker & Britt, for Respondent.

THE COURT.—When this case was in Department, in the opinion there rendered it was said:—

"This is an action for damages, wherein plaintiffs charge that, by the negligent operation of defendant's train, they were struck by it while crossing the track of defendant, and sustained the injuries for which the damages were sought. Plaintiffs were riding in a heavy wood-wagon drawn by two horses, and were approaching the crossing at which there were two tracks, the tracks of the Terminal railway and the tracks of the defendant's railway. They had passed over the track

of the Terminal road and their horses were about to step on to defendant's track when they discovered that the locomotive of a southbound freight-train on defendant's track was approaching within one hundred and fifty feet of the crossing. Plaintiff Albert Hutson, who was driving, then made an effort to stop his horses, but did not apply the brake, and immediately thereafter urged his horses forward and across the track. The older boy of the two children who were in the wagon with him ran to the rear end of the vehicle and jumped out, and the father tossed the other boy to the ground. The engine collided with the rear half of the wagon and both the plaintiffs were thrown to the ground and injured. The negligence of the defendant, as alleged, consisted in its failure to give any warning of the approach of the train by blowing the whistle or ringing the bell, and it was further charged that the train approached the crossing at a negligently high rate of speed. This speed was estimated by the various witnesses at from sixteen to twenty miles an hour. The view of plaintiffs approaching the crossing was obstructed, though there was a place of safety near the track where plaintiffs could have stopped the team and had a clear view. It was first urged by appellant that, as matter of law, plaintiffs were guilty of such contributory negligence as to preclude recovery, but upon a review of the whole evidence we think that this question was fairly submissible to the jury.

"The court, however, erred in certain instructions given to the jury, and these errors demand a new trial of the case. The court instructed the jury as follows:—

"'6. You are instructed that the plaintiffs had a right to drive in the road or street where they were and to cross the defendant's track, and they are not chargeable with contributory negligence in endeavoring to cross the track, provided they adopted all reasonable precautions against injury from moving trains, and they are not chargeable with contributory negligence unless they failed to take such precautions. In determining whether the plaintiffs took all reasonable precautions the jury should consider the situation of the crossing and the circumstances attending the accident, bearing in mind that the plaintiffs had a right to rely on the performance by the defendant's employees of every act imposed by law upon them when approaching a crossing with their train. The

plaintiffs and each of them were authorized to assume that the men in charge of the train would approach the crossing with due care, without running at an excessive or unreasonable rate of speed, and would cause the bell on the engine to be rung and kept ringing for the distance of eighty rods before reaching the crossing. The acts and conduct of the plaintiffs, and each of them, in looking out and listening for the approach of the train are therefore to be considered in connection with the assumption which they had the right to make that care in the management of the train would be exercised in the manner just indicated.'

'It is not the law of this state that a person approaching a railroad crossing is authorized to assume that the persons operating a train will not in any way be negligent in that operation. This doctrine has been asserted in some of the states, but it is opposed to the law as laid down in the decisions of this state and of the supreme court of the United States. Such a rule would abrogate the doctrine of contributory negligence in all such cases, and in the early case of *Meeks v. Southern Pacific R. R. Co.*, 52 Cal. 604, this court said: 'The 486th section of the Civil Code, providing that a railroad corporation shall be liable for all damages sustained by any person and caused by the locomotive of the corporation when a bell is not sounded or a whistle blown as directed by that section, does not abrogate the doctrine of contributory negligence, or operate to give a right of action where the negligence of the plaintiff . . . materially and proximately contributed to the injury.' In *Herbert v. Southern Pacific Co.*, 121 Cal. 227, [53 Pac. 651], this precise question was involved, this court saying: 'The only answer to this is, that defendants' employees did not ring the bell or sound the whistle and that the fireman was not at his place on the left side of the engine. The argument, of course, is that if the signals had been given plaintiff might have heard, and not hearing them, he had the right to assume when he was about to make the crossing that the train had not then reached the whistling post 1,325 feet above, and that the fireman might have seen him in time to have prevented the accident had he been on the lookout. It may be admitted that all this was culpable negligence on the part of defendants' employees. The defense of contributory negligence implies that defendant may have been guilty of

such negligence as would justify a recovery by the plaintiff if he were not also in fault. This is no argument, therefore, against the position of the defendant.' In *Green v. Southern California Ry. Co.*, 138 Cal. 1, [70 Pac. 926], the rule of law laid down in *Herbert v. Southern Pacific Co.* is reaffirmed, the chief justice placing his concurring opinion upon this precise ground. The same doctrine is also announced in *Pepper v. Southern Pacific Co.*, 105 Cal. 398, [38 Pac. 974], and in *Bilton v. Southern Pacific Co.*, 148 Cal. 443, [83 Pac. 440]. The rule is simply this: That a railroad crossing, from its very nature, is always a place of danger, and a traveler has no right to omit any of the care which the law demands of him, upon the assumption that due care will be exercised in the operation of the train. Says the circuit court of appeals in *Erie Ry. Co. v. Kane*, 118 Fed. 234, [55 C. C. A. 129]: 'Again, counsel for defendant in error urges that it was not negligence for decedent to be there because he was not bound to anticipate Bowker's negligence through which the collision came about. It is never negligence, they say, for one not to anticipate negligence in anybody else. There is, however, no such general rule of law or prudent conduct. There are instances where as a matter of law it is negligence not to anticipate negligence in others. As, for instance, it is well settled in the federal courts that it is negligence for a highway traveler not to anticipate failure on the part of an engineer to give appropriate signals of approach of his train to a highway crossing. He has no right not to look or listen because he has heard no such signals.' This is in accord with the doctrine of the supreme court of the United States, as laid down in *Railroad Co. v. Houston*, 95 U. S. 697, where it is said: 'The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen or look before attempting to cross the railroad track in order to avoid an approaching train and not to walk carelessly into a place of danger.' "

The foregoing language is adopted and adhered to. In contemplation of the new trial which must be ordered, it should be said that instruction 7, as given by the court, contains

the same error of law as that in the instruction just discussed. Additionally, it dangerously approaches the forbidden territory of instructions upon the facts. The court also instructed the jury that: "As said above, the burden of proof of such contributory negligence rests upon the defendant; unless it proves the same *to your satisfaction* by a preponderance of the evidence," etc. It would be better to omit the words here italicized. In a civil case it is the weight of evidence or preponderance of probability which is sufficient to establish a fact. (*Murphy v. Waterhouse*, 113 Cal. 467, [54 Am. St. Rep. 365, 45 Pac. 866].) As given, the instruction might tend to confuse a jury into believing that something more than this was required.

For the foregoing reasons the judgment and order appealed from are reversed.

SHAW, J., dissenting.—The opinion of the court in this case did not come to my knowledge until several days after it was filed. I deem it proper at this time to state the reasons for my belief that it is erroneous.

The statement of facts in the opinion is both incomplete and incorrect. In this court those facts which the evidence fairly tends to prove in support of the verdict must be taken as true. The plaintiffs, at a point fifty feet from the tracks of the Terminal road, stopped the wagon and looked and listened for a train. It was the best place from which to view the tracks of the two railroads for that purpose. A man passing them from the opposite direction told them no train was in sight. When on the farther side of the tracks he could see the track, in the direction from which the train was coming, for a much longer distance than it could be seen from where the plaintiffs stopped. Albert Hutson, who was driving, continued to look and listen after they again started, but neither saw nor heard the train until the wagon was on the Terminal track and within a few feet of the defendant's track and on a grade descending toward it. The train was then only about one hundred and fifty feet distant. He could not safely stop on that track, on which another train might be coming. The emergency was sudden and the danger great, and he could not be charged with negligence, as matter of law, under those circumstances, for any ordinary conduct. (*Harrington v. Los*

Angeles Ry. Co., 140 Cal. 521, 522, [98 Am. St. Rep. 85, 74 Pac. 15].) In the necessary haste, he concluded to attempt crossing before the train reached the place, whipped his horses, and almost succeeded in his design. To have used the brake after whipping the horses would have been sheer folly. No bell was rung. No whistle was sounded. The train was coming at the unprecedented speed of forty-five miles an hour. The statement that its speed was from sixteen to twenty miles an hour is not justified by the evidence, as we must view it, nor can it be said to be sustained by a preponderance.

With regard to the supposed faulty instruction, for the giving of which the judgment is reversed, the court has curiously misconceived its subject, its effect, and its purpose. The law on the subject of the negligence of one about to cross the track of a steam railroad, naturally falls into two divisions: one relating to his rights, the other to his duties. Both are equally clear and well settled. His duty is to look and listen for trains, and to stop for that purpose, if stopping is necessary to do it effectively. His right is to expect and assume that due care will be used in the operation of trains and that the signals required by law will be given. But the lack of such care, the failure to give the legal signals, will not excuse him from the duty to stop, look, and listen, nor remove the effect of contributory negligence in barring his recovery, if he fails in his own duty.

It is not necessary for the court to state the whole law in every instruction. It is practically impossible to state it in every sentence; and the division into paragraphs is a mere method of separating the sentences and subdivisions of a general subject. It is perfectly proper for the court to divide the general subject of the law of the case, and treat the respective divisions in separate paragraphs. This the court did in the present instance, treating chiefly of the rights of the plaintiffs in the instruction in question, and of their duty to be careful themselves in numerous other instructions asked by the defendant.

This instruction tells the jury that, in judging whether or not the plaintiffs were guilty of contributory negligence, they should consider the fact that plaintiffs had the right to assume and rely upon the exercise of due care by the trainmen, in giving the required signals and not running at excessive speed.

Many decisions of this court support this proposition, as the following extracts will show: "Plaintiff was authorized to assume that all other persons using the street would do so with due care. It cannot be imputed as negligence that he did not anticipate culpable negligence on the part of the employees of the defendant." (*Strong v. Southern Pacific R. R. Co.*, 61 Cal. 328.) "The plaintiff had the right to assume that the required statutory signals would be given by the defendant." (*Orcutt v. Pacific C. R. Co.*, 85 Cal. 299, [24 Pac. 661].) "The plaintiff here was exercising an undoubted right, and she was authorized to assume that all other persons using the street would act with due care. It cannot be imputed as negligence that she did not anticipate culpable negligence on the part of the defendant." (*Robinson v. Western Pacific R. R. Co.*, 48 Cal. 421.) "Ordinarily, the person operating the car has the right to assume that the one so approaching is able to and will care for himself, by taking all necessary precautions to observe the approach of the car, and that he will not place himself on its track at such a time as to be injured thereby." (*Harrington v. Los Angeles Ry. Co.*, 140 Cal. 520, [98 Am. St. Rep. 85, 74 Pac. 15].) "The deceased had a right to rely upon the usual and required signal of bell-ringing when a car is approaching." (*Driscoll v. Cable R. R. Co.*, 97 Cal. 553, [33 Am. St. Rep. 203, 32 Pac. 591].) The same rule has been stated in an endless number of decisions of other states, as well as in many decisions of this state where the right of railway employees to rely on the exercise of due care by others was involved. (*Solen v. Virginia etc. Ry. Co.*, 13 Nev. 106; *Grippen v. New York Cent. R. R. Co.*, 40 N. Y. 42; *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. St. 379, [84 Am. Dec. 457]; *Newson v. New York Cent. R. R. Co.*, 29 N. Y. 390; *Tabor v. M. V. R. R. Co.*, 46 Mo. 353, [2 Am. Rep. 517]; *Texas and Pacific Ry. Co. v. Cody*, 166 U. S. 613, [17 Sup. Ct. 703]; 2 Thompson on Negligence, sec. 1582; Shearman and Redfield on Negligence, sec. 473; 41 Am. Dig., cols. 2775 to 2784, 37 Am. Dig., col. 448; *Green v. Los Angeles etc. Ry. Co.*, 143 Cal. 31, [101 Am. St. Rep. 68, 76 Pac. 719]; *Lambert v. Southern Pacific R. R. Co.*, 146 Cal. 231, [79 Pac. 873].) Many other citations could be given to the same effect.

The duty of the plaintiffs to exercise due care in looking and listening, and the fact that this duty rested on them regardless of any failure of the trainmen to use due care or give signals, is a qualification of the rule stated in the instruction and established by the above authorities. The jury were fully instructed on this point. They were informed that, in ascertaining whether or not a train was coming, the plaintiffs were required to exercise "such care as a person of ordinary prudence would exercise under the circumstances"; that they must "make use of all their senses" in so doing; that they "must use vigilantly the senses of sight and hearing," and that if it was necessary to stop in order to hear well, then they must stop for that purpose; that any neglect on their part in these particulars would bar a recovery if it contributed to the injury, notwithstanding the negligence of the defendant may have caused it. And with regard to the effect of their rights aforesaid upon their own duty, the court instructed the jury that, while travelers in a vehicle approaching a railroad crossing "have a right to rely upon the presumption that railway employees engaged in running trains toward such crossing will use precautions to prevent collisions, yet that such travelers have no right, on that account, to relax in any way the vigilance required of them by law in such circumstances and at such a place. They are under the duty of both listening and looking, and of listening and looking at points and places and in such circumstances that the listening and looking will give them protection."

If the instruction quoted in the main opinion is subject to criticism on the ground that it does not state with sufficient clearness the duty of the plaintiff as a qualification of the rule regarding their rights, it is supplemented and fully cured in that respect by the instruction last quoted, which states clearly both the right and the duty of plaintiffs and the fact that negligence of the defendant does not excuse the plaintiffs from exercising due care.

The true rule regarding this qualification is well stated in the main opinion to be that "A traveler has no right to omit any of the care which the law demands of him, upon the assumption that due care will be exercised in the operation of the train." The authorities cited in the opinion fully

sustain this statement of the qualification, but the extracts given omit the context, and are consequently misleading so far as they seem to lend support to the idea that it is not the law that the traveler, while not omitting the care due from him, may rely on the performance of duty by the defendant, so long as due care on his part does not disclose to him its failure to do so. The cases do not so declare. If the instruction declared erroneous had stated that the plaintiffs had the right to omit any of the care which the law demanded of them, because of their reliance on the care of the defendant, the criticisms would have been deserved. But it does nothing of the sort, and in view of the explicit instructions to the contrary, it could not have been so understood by the jury.

The criticism of the instruction that contributory negligence is to be proven by the defendant by a preponderance of the evidence and to the satisfaction of the jury is not warranted. The instruction is based on the rules of evidence as laid down by the positive mandate of the Code of Civil Procedure. It is conceded that the burden is on the defendant and that a preponderance is necessary, but it is suggested that the jury need not be *satisfied* of the fact. The code declares that they must be satisfied. "That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict." (Code Civ. Proc., sec. 1835.) The court seems to have feared that the words "to your satisfaction," might be understood by the jury to mean "beyond a reasonable doubt." But the jury must be presumed to understand words according to their ordinary meaning.

Rehearing denied.

Beatty, C. J., and Shaw, J., dissented from the order denying a rehearing.

[L. A. No. 1726. Department Two.—March 25, 1907.]

H. CRABTREE, Appellant, v. Z. M. POTTER et al, Respondents.

CONSTRUCTIVE TRUST — DEED FROM PARENTS TO DAUGHTER — PROMISE WITHOUT INTENT TO PERFORM.—A deed made by parents to their daughter, in whom they reposed full confidence, solely upon the conditions and in consideration of her promises to pay the balance of a mortgage on the land conveyed, and that the grantors should have and retain the premises as their home as long as the mother lived, which latter promise was made by the grantee without any intention of performing it, is obtained by fraud, and under such circumstances the law raises a constructive trust in favor of the grantors.

ID.—PAROL EVIDENCE OF CONSTRUCTIVE TRUST.—Parol evidence is admissible to establish such a constructive trust. Section 852 of the Civil Code, declaring that a trust in lands can only be created by an instrument in writing, has no application to constructive trusts.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

M. C. Hester, for Appellant.

Bower & Hutchinson, for Respondents.

LORIGAN, J.—This is a controversy between daughter and parents over a couple of lots of land in Hazard's East Side Addition in Los Angeles.

The plaintiff filed an ordinary complaint in ejectment to recover possession of the land. Defendants, by answer, denied her ownership or right to its possession, and also filed a cross-complaint, the essential averments of which were: That defendants were husband and wife, and purchased the property in question in 1900 for four hundred dollars, taking title for the benefit of the marital community in the name of the wife; that on July 19, 1901, there was a mortgage debt upon the lots for one hundred and fifty dollars, being the balance of the purchase price: that defendants were at

that date old and infirm and financially poor, having no property save these lots; and that it was difficult for them to make enough money to support their family, and it was a matter of struggle and self-denial for them to make payments on the mortgage; that plaintiff, their daughter, proposed to them that if they would convey said property to her she would pay the balance of said mortgage, and that defendants should have and retain said premises as their home as long as they lived; that feeling they would thus be relieved from the burden of making payments on said mortgage, and also be secured in a home for life, they consented to her proposition; that they had confidence in her and trusted and relied on her statements and promises, and so confiding and trusting, and induced to do so solely by her promises, they, on July 19, 1901, executed a deed conveying the property to her; that said property was then worth eight hundred dollars; that said statements of plaintiff were false and fraudulent, and made by plaintiff to defendants with intent to deceive and defraud them out of their property; that plaintiff did not intend to perform the same, but intended when they were made to deceive and defraud the defendants; that plaintiff has violated her trust and seeks to eject defendants from the said premises. The cross-complaint closes with a prayer that the deed to plaintiff be set aside and annulled; that it be decreed that plaintiff holds the property in trust for defendants, and for general relief.

Plaintiff, by answer to the cross-complaint, practically denied all the allegations therein except as to the execution of the deed, and alleged that all the money that was paid by defendants for said property was money she had loaned her mother for that purpose. She further alleged that about July 19, 1901, her mother applied to her for a further loan to make payment on said property, which she refused to let her have; that her mother then offered to deed her the property if she would pay off the balance of the mortgage and release her from the loans theretofore made to her by plaintiff; that plaintiff consenting to do so, defendants deeded her the property and she released them from said loan and assumed and paid off the mortgage.

Upon all the issues made by the cross-complaint and answer thereto the court made findings in favor of defendants, and

a judgment and decree were entered to the effect that the title to the lots involved was vested in the plaintiff in trust for the defendant Anna L. Potter during her lifetime; that said Anna L. Potter owned an estate for life therein, and directed that plaintiff within thirty days, or on her default a commissioner designated in the decree for that purpose, should execute a deed conveying to said Anna L. Potter an estate for life in said premises.

Plaintiff moved for a new trial, which was denied, and this appeal is taken from the order denying said motion and from the judgment.

In examining the points urged by appellant in his brief, we do not understand that he makes any claim of error under his appeal from the judgment. His attack seems to be devoted exclusively against the findings, upon the ground that some of them are not supported by the evidence. It is true that he claims the court erred "in adjudging that plaintiff have no relief by her action," and "in decreeing that the title to said property is vested in plaintiff in trust for defendant Anna L. Potter, during her life, and that she owns a life estate in said property"; but after he states these points and proceeds to elaborate them his discussion is devoted entirely to an effort to show that the evidence in the case did not justify the findings made by the court; not that the findings did not support the judgment. If, however, appellant did intend, notwithstanding that his discussion would indicate differently, to attack the judgment upon the ground that it was not supported by the findings, we think it is without merit. The court specifically found all of the facts alleged in the cross-complaint as the defendants alleged them, and against the facts set up in the answer of plaintiff to it, except as to the payment by her of the mortgage. Among these were findings that defendants on the date of the conveyance to plaintiff were the owners of the lots in question; that they reposed full confidence in the plaintiff, their daughter; that the conveyance to her was made by them solely upon the conditions and in consideration of her promises and agreements with them to pay the balance of the mortgage on the property, and that defendants should have and retain said premises as their home as long as said Anna L. Potter lived; and that the latter promise was made by

plaintiff without any intention of performing it, and was fraudulent. These findings conclusively show that the conveyance of the property from defendants to plaintiff was obtained by fraud upon her part inducing it, and under such circumstances the law raises a constructive trust in favor of the defendants. Such a trust was decreed upon these findings, and there can be no question but that the decree is fully supported by them. This proposition is so firmly established that any discussion of it is unnecessary. It will be found fully considered in *Brison v. Brison*, 75 Cal. 525, [7 Am. St. Rep. 189, 17 Pac. 689]; *Nordholt v. Nordholt*, 87 Cal. 552, [22 Am. St. Rep. 268, 26 Pac. 599]; *Hayes v. Gloucester*, 88 Cal. 560, [26 Pac. 367]; *Hayne v. Herman*, 97 Cal. 259, [32 Pac. 171]; *Jones v. Jones*, 140 Cal. 590, [74 Pac. 143]; *Becker v. Schwerdtle*, 141 Cal. 389, [74 Pac. 1029].) Upon the authority of these cases the findings fully warranted the decree made by the trial court in the case at bar.

On the point of insufficiency of evidence to sustain the findings it is enough to say that if there was not a decided preponderance of evidence in favor of every fact alleged by defendants and found by the court to be true, there was at least such a conflict in the evidence as precludes any disturbance of the findings by this court.

There was no error in admitting parol evidence to establish the trust as alleged in the complaint. What was sought to be established was a constructive trust, and the statutory provision (Civ. Code, sec. 852) declaring that a trust in lands can only be created by an instrument in writing has no application to constructive trusts. Such trusts are created by operation of law, and are expressly excepted from the code provision referred to requiring trusts in land to be created by written instrument, and may always be established by parol. This proposition is likewise clearly settled by the authorities above cited.

The judgment and order appealed from are affirmed.

McFarland, J., and Henshaw, J., concurred.

himself to about two hundred and fifty inches, measured under a four-inch pressure, of the waters of said Pine Creek, and asked for a decree quieting his title thereto.

On November 20, 1899, (the original complaint having been filed February 1, 1899,) the cause was at issue, and thereafter was set down for trial on March 13, 1900; the trial to be had before a jury as advisory to the court on questions of fact. On the day set for the trial a jury was impaneled and sworn, and thereafter the plaintiff moved the court for leave to file an amended complaint. The difference between the proposed amended complaint and the original was, that in the original complaint the appropriated waters in litigation were stated to be "the waters of Pine Creek," while in the amended complaint it is alleged that plaintiff had diverted from the natural channel of Pine Creek more than a hundred inches of the waters thereof, measured under a four-inch pressure, and by means of dams, ditches, natural channels, and watercourses had conducted the said waters of Pine Creek from their natural channel to the natural channel of Horton Creek, and mingled the said waters with certain surplus waters flowing and being in the latter creek, and from thence conducted the said mingled and combined waters through the natural channel of said Horton Creek to a dam constructed by plaintiff across the channel of said Horton Creek, a short distance west of plaintiff's lands, where they were there equally divided between plaintiff and defendant, and from thence by ditches constructed by plaintiff he conducted one hundred inches of the said mingled and combined waters to his land.

In effect, the amended complaint differed from the original only in substituting "the mingled and combined waters of Pine Creek and Horton Creek" for "the waters of Pine Creek."

The defendant objected to the plaintiff being permitted to file the proposed amended complaint on various grounds—laches in presenting it for filing, want of notice of the motion to be permitted to do so, and that the amended complaint raised a new and distinct issue for the trial of which defendant had had no opportunity to prepare.

The court held that the plaintiff should be allowed to file said amended complaint, but only on terms, and the court

ID.—GOOD FAITH OF AMENDMENT—REVIEW OF ORDER REFUSING AMENDMENT—EVIDENCE.—In reviewing the refusal of the court to grant the amendment to the complaint unless the unjust terms were complied with, it must be assumed that the amendment was sought in good faith, and that the allegations in respect to the appropriation of the combined waters were true. And such error will not be deemed harmless, as there could be no trial of the cause on its merits, nor determination of the plaintiff's rights, by limiting the inquiry to the appropriation of the waters of the single stream specified in the complaint; and especially will the error not be deemed harmless where the defendant, on the cross-examination of the plaintiff's witnesses, and in introducing evidence in support of his own case, brought out the fact that the plaintiff's lands were watered by such combined waters, and the court again refused to permit the amended complaint to be filed in order that the pleadings and proof might conform.

APPEAL from an order of the Superior Court of Inyo County refusing a new trial. Walter A. Lamar, Judge.

The facts are stated in the opinion of the court.

P. W. Forbes, W. D. Dehy, and P. H. Mack, for Appellant.

S. E. Vermilyea, and B. H. Yandell, for Respondent.

LORIGAN, J.—This is an appeal from an order denying the motion of plaintiff for a new trial.

The action was brought by plaintiff to quiet his title to a hundred inches of water of Pine Creek, in Inyo County, measured under a four-inch pressure, and conducted through dams, ditches, natural channels, and watercourses to and upon the lands of plaintiff; said hundred inches being alleged to be one half of two hundred inches under said pressure diverted by plaintiff and the grantor of defendant, and equally divided by them and used on their respective lands. In addition, plaintiff prayed for an injunction restraining defendant from diverting more than one half of said waters, and for damages to his crops by reason of the alleged diversion by defendant of all of said waters.

Defendant, by answer, denied the right of plaintiff to any of the waters of Pine Creek, or to damages for the alleged diversion by him, and by cross-complaint alleged an exclusive prescriptive right acquired by his grantors, predecessors, and

made in open court after the jury had been sworn and the trial about to be proceeded with. Without any notice of such application plaintiff sought permission to file his amended complaint on the ground that the original complaint of plaintiff did not fully state his cause of action. As presented, the amended complaint raised a new issue, upon which certainly different evidence would have to be presented than under the original pleading. The questions of the right of plaintiff to have his motion granted and the effect upon the progress of the trial by permitting it were immediately taken up and considered by the court, and in the presentation of the objections of defendant (which plaintiff did not question nor assert anything to the contrary), it was insisted that if the amendment were allowed the defendant would not be able to go on with the trial, and that a continuance would have to be had. This was a sufficient showing to invoke the discretion of the court, and warranted it in imposing such terms upon the plaintiff as the justice of the case required.

Now, as to whether the terms imposed on plaintiff were just, because, while under the statute the court is vested with discretion in imposing them, it is limited in the imposition to such only as are just. By this is meant that the terms imposed shall be such as will be just, considering the circumstances under which the amendment is asked, and particularly as between the parties to the action,—such as will compensate the party for the loss or inconvenience which he will suffer by granting the application to amend. In imposing such terms it is not to be understood that the court is constrained to allowing a party only such costs as might be properly taxed in the case. A reasonable discretion may be exercised in compensating him for expenses to which he has been put, although they may not be recoverable as costs. (*Pomeroy v. Bell*, 118 Cal. 635, 638, [50 Pac. 683].) But whatever the terms, they should be such as have relation to expenses or charges incurred by the parties to the trial, or directly with reference to it, and be imposed with a view mainly of compensating the party prejudiced by granting the amendment.

Within this view it was proper for the court to require the payment by plaintiff of the fees paid by defendant for the per diem of jurors impaneled and sworn to try the case, and equally proper to require payment of the expenses incurred

by the defendant in obtaining the attendance of witnesses. These items were such as would be ultimately taxable as costs should defendant prevail in the action. Nor was it improper to require the payment of one hundred dollars to defendant as compensation for expenses incurred in the employment of attorneys and his own expenses in attending the trial. While these were not taxable charges, they come within the rule of *Pomeroy v. Bell*, 118 Cal. 635, 638, [50 Pac. 683]. Payment of all these charges mentioned we think was such as, in a reasonable exercise of its discretion, the court was warranted in imposing upon defendant and appeared to be just.

But we can find no warrant in law for imposing on the defendant, in addition to these terms, the payment to the clerk of the court of the per diem and mileage paid by and due from the county to jurors summoned for the trial, amounting to \$240.90. These were the expenses of the general panel of jurors and under no circumstances could be considered as costs in the action or taxable as such. It was part of the governmental duty of the county of Inyo, in the administration of justice therein, to furnish to litigants in its courts, entitled to have their cases tried before a jury, a panel consisting of sufficient competent persons from which the litigants might select a trial jury. The expense of securing the attendance on court of that panel is paid by the county as one of the general expenses of government. When a trial jury has been selected from the panel, the liability of the litigants to pay that jury then attaches, but it only attaches then as far as the members of the trial jury are concerned. As to the rest of the panel the litigants never were liable for any expenses relative to them. In the case at bar the court made an order directing the plaintiff to pay the per diem of the jurors selected to try the case, and as a matter of justice this should have been all, as to the jurors, which he should have been required to pay. The expense of providing the general panel was not an expense of defendant, and of course payment was not directed to be made to defendant, but to the county of Inyo, which was not a party to the action. It was as much the governmental duty of the county of Inyo to furnish the panel of jurors and pay the expenses of such as the litigants did not select to try their case as it was to furnish a courthouse and court for the administration of justice, and the court could

have as consistently charged the plaintiff with a proportionate share of the salary of the judge as with the expenses incurred by the county in providing the general panel out of which the trial jurors were selected. The matter here under consideration does not present a situation where a jury trial was demanded, a panel provided, and then an amendment allowed under circumstances which necessitated a continuance of the trial without the selection of a trial jury at all, and where the amendment is granted on condition that the moving party pay the expenses of the attendance of the panel. (See *Baumberger v. Arff*, 96 Cal. 261, [31 Pac. 53].) Here a trial jury had been selected from the panel and all members of the panel other than those selected must have been discharged from attendance, or excused till some future date. In any event; as far as the case at bar was concerned, the panel had been discharged for all purposes. No amendment or continuance of the case could possibly affect the panel or the relation of the court, the litigants, or selected jury to it. It was at an end for all purposes as to them.

Under such circumstances we can perceive no reason, and none has been suggested, why plaintiff should have been charged with reimbursing the county of Inyo for governmental expense. Ample provision seems to have been made to reimburse defendant for expenses incurred by him and taxable as costs and for expenses not so taxable, which was all proper and just. But to tax plaintiff for expenses incurred by the county of Inyo for a panel of jurors which it was its duty to furnish, and which had served its purpose and been discharged before the motion to amend was made and after a jury had been selected from it; a panel for the expenses of returning which neither party was liable, and the existence of which could not enter into or affect the motion to amend, and could have no relevancy to any future progress of the trial, was, we think, improper. It was in no sense the imposition of a term which under the circumstances, or as between the parties, was just, but was more in the nature of a fine or penalty imposed on plaintiff, which the law does not sanction or sustain.

The court having imposed this improper charge upon plaintiff in addition to proper charges imposed, it was not incumbent on plaintiff to offer to pay the amounts which he deemed

were properly assessed in order to avail himself of the error of the trial court on this appeal. It is the duty of the lower court to impose as a condition only just terms. The terms here imposed were in the aggregate, and a portion improper, and the plaintiff was not required to attempt a segregation of the proper from the improper, in the face of the ruling of the court that all were properly imposed and must be paid as a condition to granting leave to amend.

Nor is it of any moment that the court might have denied the motion unconditionally. Assuming it would have been warranted in doing so, it did not. It exercised its discretion in favor of the amendment, and, having done so, it could only impose just terms therefor.

The only ground upon which this court would be precluded from reversing for such error would be if it appeared from the record that, notwithstanding the error, the appellant was not injured or prejudiced thereby. It is undoubtedly true that, though an error be committed, it may still be harmless; as, for instance, it may appear from an examination of the record that if the amendment had been allowed it could have been of no benefit to the plaintiff, because upon the trial of the case it would appear that he never could have availed himself of it, or where it appeared upon the trial that, notwithstanding the amendment was refused, the case was still tried upon the theory that it had been allowed. But on examination of the record before us we cannot satisfy ourselves that the error of the trial court was harmless. In itself the issue as to the appropriation of the litigated waters presented by the amended complaint was a more enlarged issue, involving a more substantial right than presented by the original complaint—a difference between the appropriation and use of the waters of Pine Creek, and the appropriation and use of the mingled and combined waters of Pine Creek and Horton Creek. It must be assumed as to this amendment that it was sought in good faith, and that the verified allegations in respect to the appropriation of said combined waters were true. This being so, it is quite evident that there could be no trial of the cause on its merits, nor determination of plaintiff's rights therein, by limiting the inquiry to the appropriation of the waters of Pine Creek, because plaintiff did not claim a right by appropriation to

the waters of Pine Creek alone, but to the mingled and combined waters of Pine Creek and Horton Creek.

In addition to this, during the actual trial of the case, while plaintiff in introducing his evidence was necessarily precluded, under the ruling of the court refusing permission to file his amended complaint, from submitting evidence as to any appropriation by him of the combined waters of Pine and Horton creeks, defendant on cross-examination of some of the witnesses of plaintiff showed that the lands of plaintiff were in fact watered by the mingled and combined waters of these creeks appropriated by plaintiff. There was also evidence tending to show the same fact brought out by defendant in producing evidence to sustain the allegations of his cross-complaint. Having this evidence in view, the plaintiff at the close of his case, and also at the close of the case when all the evidence was in, moved the court again to be permitted to file the amended complaint in order that the pleadings and proof might conform. Both applications were refused and plaintiff excepted.

Waiving consideration of the alleged error predicated on these refusals, it is quite apparent from the evidence to which we have referred, that the court in originally denying leave to plaintiff to file his amended complaint, and confining the parties to litigate an appropriation of the waters of Pine Creek alone, precluded him to his prejudice from having determined the real and substantial claim upon which he relied,—namely, a right to the mingled and combined waters of Pine and Horton creeks.

It is further insisted by appellant, aside from the claim of error we have been considering, that the court erred in overruling objections to questions asked the plaintiff on cross-examination. There was no error in permitting the inquiry made. The plaintiff had testified in chief as to a division and use of water between himself and one J. W. Dickinson, the latter using his share of the water on what was known as the Hank Horn land. The objection was mainly that there was no evidence connecting defendant with this land. We think, however, plaintiff's direct examination sufficiently showed it for the purpose of the cross-examination. In any event, it was subsequently shown, so that the error, if any, was immaterial and harmless.

Appellant also attacks many of the findings of the court on the ground that they are not sustained by the evidence. These findings all relate to waters of Pine Creek alone, their appropriation by defendant, the extent of his rights therein, and against the right of plaintiff to any claim or interest thereto. As we will have to reverse the order denying a new trial on account of the error of the court in accompanying its leave to plaintiff to amend by the imposition of illegal terms, we see no useful purpose to be subserved by discussing the findings. In view of a new trial, when other findings may be prepared, it would be improper to discuss the evidence with reference to those here presented, which must fall with the reversal of the order. To discuss them would only result in commenting on, contrasting, and expressing our views on the testimony, matters which, in view of another trial, should particularly be avoided. And in as far as we have referred to the testimony, we are not to be understood as holding that it was sufficient to sustain the claim of plaintiff as to his alleged appropriation of the combined waters of the two creeks. We refer to it solely as tending to support his claim that only by allowing the proposed amendment could his rights to the waters in dispute, combined and flowing in those two creeks, be determined.

The order denying the motion for a new trial is reversed and the cause remanded. As the reversal of the order vacates the judgment, the trial court is directed to allow either party to amend his pleadings.

McFarland, J., and Henshaw, J., concurred.

[L. A. No. 1684. In Bank.—March 28, 1907.]

R. J. HIPWELL et al., Appellants, v. PIONEER INVESTMENT AND TRUST COMPANY (a Corporation), Respondent.

CONTRACT TO ENGAGE IN REAL ESTATE BROKERAGE BUSINESS CONSTRUED
—INDIVIDUAL SPECULATION.—Upon a construction of the contract sued on, whereby the parties agreed to engage in a "general real

estate, rental, collection, and insurance business," and to divide the profits resulting therefrom, *held*, that the contract did not contemplate anything more than the usual brokerage business conducted by real estate and insurance agents, and did not entitle plaintiffs to a share of the profits resulting from the purchase and sale of land by the defendant on its own account.

APPEAL from a judgment of the Superior Court of Los Angeles County. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Hunsaker & Britt, for Appellants.

John S. Chapman, John D. Pope, and T. C. Thornton, for Respondent.

BEATTY, C. J.—In October, 1892, the parties to this action entered into a contract in writing as follows:—

"This agreement made and entered into this 16th day of October, 1902, by and between the Pioneer Investment and Trust Company, a corporation, party of the first part, and R. J. Hipwell and T. B. Grandstaff, parties of the second part, witnesseth:

"That, whereas said party of the first part is desirous of establishing in connection with its stock and bond brokerage, corporate agency and promotion business, a real estate department, for the purpose of carrying on and conducting, in the city of Los Angeles and elsewhere, a general real estate, rental, collection and insurance business; and,

"Whereas, the parties of the second part are desirous of taking charge of and managing and conducting said real estate department for and on behalf of and in conjunction with the party of the first part;

"Now, therefore, the party of the first part agrees to furnish and equip a suitable room, in connection with its general offices in said city of Los Angeles for the use of said parties of the second part in conducting said real estate business, and it is also agreed that said party of the first part pay all reasonable expenses of maintaining the same, such as rent, telephone, stationery and advertising and make all other outlays necessary or incident to the proper conduct of said real estate business in a businesslike manner.

"The party of the first part further agrees that it will pay and allow said parties of the second part, jointly, as their compensation, and in full for their services for conducting and managing such real estate brokerage business, one half of all commissions, fees, charges or gross profits, of all and every character accruing from sales made or other business pertaining or incident to said real estate department, negotiated by said parties of the second part or either of them, through or in connection with conducting and handling said general real estate agency business.

"The parties of the second part agree that they will faithfully devote their whole time during reasonable business hours, and will exert their best endeavors toward conducting the affairs of said real estate department in a businesslike manner and for the best mutual interests of all parties hereto, and they further agree that they will accept, in full payment for their said services, the said one half of the gross receipts of all said business negotiated, handled and conducted by them as hereinbefore expressed.

"It is further agreed that the business of said real estate department shall consist in buying, selling, owning, handling or otherwise dealing in real estate or real property or interests therein, as a real estate agent or broker; acting as a general insurance agent in negotiating and placing fire insurance on all and every character of property either as broker for insurance companies or representative of other agents for such companies; acting as agent for owners of real property in renting or leasing same and collecting and accounting for the rentals or other profits thereof; and said business of said department shall in no wise be construed to include the stock, bond, brokerage or other business of said party of the first part and the proportion of profit accruing to the parties of the second part shall bear no relation thereto.

"It is further agreed that all the business of said real estate department shall be conducted in, by and under the name of the party of the first part as a corporation, and that the parties of the second part shall act in all things pertaining to conducting said real estate department, by, through and with the general direction of the officers of the party of the first part.

"It is further agreed that all profits accruing from such business, so handled or negotiated by the parties of the second

part, and all record of business pertaining thereto shall be reported as soon as practicable to the secretary or other authorized officer of said party of the first part, and the record thereof kept, and all moneys or property incident thereto handled, in pursuance of the by-laws and authorized orders of the board of directors of said party of the first part.

"It is further agreed that the profits from which said parties of the second part shall receive their share or division, as aforesaid, shall include profits arising from the transaction of the business of said department, whether the same be brought in or negotiated by said parties of the second part or by any of the officers of the party of the first part.

"The life of this contract shall be one year from date subject to revocation or amendment by said parties hereto.

"In witness whereof," etc.

Pursuant to said contract a "real estate department" of defendant's business was established and put in charge of the plaintiffs, but it does not appear that they transacted any business except that out of which this litigation has arisen. Very soon after the date of the contract they negotiated for the purchase by defendant of a tract of land in the city of Los Angeles, which was surveyed, subdivided into lots, and mapped as the Hollenbeck Heights tract. The plaintiff Hipwell took actual charge on the ground of the work of surveying, grading of streets, and sidewalking said tract, and had personal supervision and charge of the grading outfit and of the working force during those necessary preliminaries to the marketing of the lots. When the lots were put upon the market, defendant sought and obtained from plaintiffs permission for the employment of outside brokers, and the allowance of commissions to them on such sales as they should make. All but eleven of the lots were sold for about \$12,267. They had cost, including purchase price of the tract and expense of subdividing, grading, etc., about \$8,639, so that the profits of the speculation amounted to \$3,628.

Plaintiffs asserted a claim under the contract to one half of these profits. Defendant denied their claim to a share of the profits of the speculation, contending that under the contract they were entitled to no more than one half of the

commissions on the sales that had been made. As a result of this difference, defendant, on the 1st of February, 1903, terminated the contract, and plaintiffs commenced the present suit for an accounting of the profits of the transaction here detailed, and for a recovery of the one half, which they contend they are entitled to under the terms of the agreement as above set forth. Defendant answered, defending the action upon its construction of the contract, and the superior court, upon findings of fact which are substantially embodied in the foregoing statement, sustained the defense, giving judgment to the plaintiffs for only a small balance found due for commissions, without costs. The appeal is from the judgment alone, and presents the single question of the true construction of the written agreement.

Looking alone to the terms of the writing, its meaning cannot be said to be entirely clear, but the weight of the argument, I think, is very decidedly in favor of the construction placed upon it by the superior court. The "general real estate, rental, collection and insurance business," to be added as a department to the established business of the defendant, does not, *ex vi termini*, imply, and certainly does not express, anything more than the usual brokerage business conducted by real estate and insurance agents, and we find in a subsequent clause that the business is expressly designated as "such real estate brokerage business" in immediate connection with the stipulation fixing the compensation of the plaintiffs for their services, which is to be "one half of all commissions, fees, charges, *or*" (not *and*) "gross profits of all and every character arising from the sales," etc. Here, it will be seen, commissions, fees, and charges, according to the grammatical construction of the sentence, are made the equivalent of gross profits, and those words have no application to the selling price of lands, or to the difference between the purchase price and the selling price.

But counsel for appellants strongly insist that in another and subsequent clause of the agreement the parties have given, as they had a right to do, a definition of the purpose and scope of their contract, which, so far as it is unambiguous, the court is bound to accept. The legal proposition is conceded, but it is denied by respondent that the definition in question is unambiguous or at all in conflict with what appears

in the previous clause. The language of the clause here referred to is: "It is further agreed that the business of said real estate department shall consist in buying, selling, owning, handling, or otherwise dealing in real estate, or real property, or interests therein, *as a real estate agent or broker,*" etc. I have italicized those parts of this clause to which the respective parties attach peculiar importance. Respondent contending that the words "as real estate agent or broker" qualify everything that goes before, while the argument on the other side is that it would be absurd to connect them with the word "owning," for the reason that there can be no such thing as owning property in the capacity of broker. It cannot be denied that grammatically the last words of the clause do qualify all that precedes them, and it is equally undeniable that to allow them that effect as to the word "owning," is to produce a legal absurdity. The result, however, is simply to add an ambiguity to what is otherwise clear, and this requires the rejection of the ambiguity. But even if the word "owning" should be taken by itself, detached from its context, it is clear that all the other words, "buying, selling," etc., are qualified by the words "as a real estate agent and broker," and this renders the word "owning" entirely meaningless, for the mere owning of property is not a business or any part of a business. Especially it is not a business involving fees, charges, commissions, or profits, gross or net. Nothing is to be gained, I think, by further attempts at mere verbal analysis of this clause of the agreement. There is, in my opinion, a more conclusive argument against the construction contended for by appellants in the fact that the agreement is perfectly silent as to the manner in which funds are to be provided for the purchase of property by the department. If, as contended, it was the understanding that, in addition to its brokerage and agency business, the department was to engage in the purchase and sale of real property on its own account, it seems incredible that parties stipulating so carefully, and with such redundancy of words regarding other matters, and so explicitly enumerating the various items of office expenses to be borne by defendant, should have omitted to make any provision for raising or advancing the funds necessary to effect the contemplated purchases. Upon this point I have

not failed to consider the argument of counsel that the advance of the necessary funds for this purpose by the defendant is stipulated in the general words of the third clause of the contract: "and make all other outlays necessary or incident to the proper conduct of the said real estate business in a businesslike manner." I think, however, that these words, taken in the connection in which they occur, and with the qualification which they contain, cannot be held to refer to anything except the expenses of conducting the business of the office. They are to be construed according to the maxim *Noscitur a sociis*, and cannot be extended so as to comprehend an obligation on the part of defendant to provide all the purchase money for contemplated purchases of property to be improved and sold on speculation.

Another argument in favor of appellants' contention is based upon the frequent occurrence of the word "profits" in the agreement, the argument being that it is a word fitly used in reference to the excess of the selling price of land or other commodity over cost, but is not properly descriptive of the earnings of a broker in the form of commissions, fees, etc.

It seems a sufficient answer to this argument to say that in a contract like this, the fees and commissions of the brokers, being the profits of the business, are properly so designated.

It is further contended, and must be conceded, that in construing a contract, the situation of the parties—the surrounding circumstances—must be considered, and it is claimed that the court cannot put itself in the position of these parties without taking judicial notice that by the prevailing custom a general real estate business, especially in Los Angeles for several years prior to October, 1902, has comprehended not only agency or brokerage in the purchase and sale of lands, but purchase and sale on account of the broker or firm of brokers. Without deciding the legal proposition involved in this argument, it may be conceded for the purposes of this decision that the parties to this agreement were well informed of the custom said to have been prevalent among real estate brokers in Los Angeles of combining with their brokerage business ventures on their own account. But on this supposition it seems all the more strange that if they expected to conform to the custom they should have omitted all provision

for the contribution of the purchase money necessary in such ventures. If they knew that they could combine speculation with agency, they knew equally well that they could confine themselves to agency, and, from the terms of their agreement, it would seem that they did so.

The contention of appellants that it is altogether unreasonable to suppose that they would have entered into this agreement to give their whole time to the business of the department for one half of the commissions when they could have gone into business by themselves and retained the whole of the commissions, rests upon the assumption that they could foresee the failure of the projected brokerage business which they had in contemplation. No doubt they expected success where they encountered only failure. Perhaps they were without the necessary means to provide an office and pay the expenses involved in what appears to have been an experiment to last for a year—the business to be continued or abandoned according to the results. If they had made the experiment upon their own resources, their small gains might have netted a considerable loss. Conducted as it was, in connection with the defendant, the only business the department ever did (so far as appears) was the negotiation of the purchase and sale of this Hollenbeck Heights tract—property purchased and improved by the defendant with its own funds and at its own risk. It does not seem to be a valid ground of complaint on the part of the plaintiffs that the defendant gave them the only opportunity they had to make any earnings at all during the fourteen weeks the business continued. The only remaining argument in support of the appeal which seems of sufficient importance to demand particular consideration is based upon the merely probative facts found by the court that the plaintiff Hipwell personally superintended the subdivision of the tract and the grading and sidewalking of the streets, and that the defendant sought and obtained the consent of the plaintiffs to the employment of outside brokers to negotiate sales. This it is contended shows the practical construction of the contract by the parties, and that they understood that the profits of the speculation were to be shared equally between them. But the court does not so find, and its conclusion as to the proper construction of the agreement cannot be set aside on the strength of these

findings, unless they are absolutely and fatally inconsistent with that conclusion. No such inconsistency is apparent. Assuming the contract to have been confined to a brokerage business, there is nothing inconsistent in the fact that the defendant, on the suggestion of plaintiffs, should have bought the Hollenbeck tract and prepared it for sale at its own expense and risk. Nothing in the contract excluded it from engaging in such a venture, and nothing in the contract required it to share the gains of the speculation, any more than it requires the plaintiffs to bear a share of the loss. That Hipwell should have superintended the subdivision of the tract, the grading, etc., is not surprising, if his department was to have commissions on the sale of the lots, especially considering that the department had nothing to do until the subdivision, grading, etc., was complete, and these lots in a condition to be put upon the market. And if he did superintend the preparation of the lots for sale, upon an understanding, tacit or otherwise, that the department was to negotiate the sales, it was natural that defendant should ask the consent of plaintiffs to the employment of outside brokers, and the payment to them of a portion of the commissions. In view of these considerations, it cannot be held that there is any fatal inconsistency between these probative facts and the conclusion of the superior court that the contract of the parties did not cover the profit of the Hollenbeck tract venture.

The judgment of the superior court is affirmed.

McFarland, J., Angellotti, J., and Lorigan, J., concurred.

Shaw, J., and Sloss, J., dissented.

[L. A. No. 1704. Department Two.—April 1, 1907.]

**PHILIP L. WILSON, Respondent, v. SOUTHERN PACIFIC
RAILROAD COMPANY, Appellant.**

**PUBLIC LANDS — RAILROAD GRANT — RESERVATION WITHIN INDEMNITY
LIMITS.**—*Southern Pacific R. R. Co. v. United States*, 168 U. S. 1,
followed to the effect that lands within the indemnity limits of a
railroad grant, which were reserved at the time of the grant but

subsequently restored to the public domain, could not, after such restoration, be selected by the railroad company in lieu of losses within the primary limits of its grant.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

William Singer, Jr., and Guy Shoup, for Appellant.

Frederick W. Houser, and Camp & Lissner, for Respondent.

HENSHAW, J.—This is an action by plaintiff to recover from defendant moneys paid on account of the purchase of lands. In its nature it is like the cases of the *Southern Pacific R. R. Co. v. Lipman*, 148 Cal. 480, [83 Pac. 445], and *Wilson v. Southern Pacific R. R. Co.*, 135 Cal. 421, [67 Pac. 688], where the facts will be found sufficiently stated.

In this case plaintiff contends that it has been finally determined that patent shall not issue to the defendant, and that therefore he is entitled to his recovery. This contention he charges in two counts, the first based upon decisions of the supreme court of the United States, the second upon the fact that patent has actually issued to him.

The first of these propositions is the only one that requires consideration. The court found that it had been finally adjudicated, and decided that patent was not to issue to the defendant. Its conclusion was based upon the decision of the supreme court of the United States in *Southern Pacific R. R. Co. v. United States*, 168 U. S. 1, [18 Sup. Ct. 18]. By appellant it is contended that while it is true that a part of the land in controversy in that case was within the indemnity limits of the branch-line grant to the Southern Pacific, there was no discussion whatever of the question whether lands within the indemnity limits of a railroad grant, which were reserved at the time of the grant, but subsequently restored to the public domain, could, after such restoration, be selected by the railroad company in lieu of losses within the primary limits; that such was what was actually done in the case at bar, and the right of the railroad company so to do,

and the investment of title in the railroad after so doing, are matters which have never been adjudicated against appellant's contention, and certainly not by the decision in the 168 U. S.

It is true that the question as to the precise lands here in controversy has never been decided, but, as was said in *Southern Pacific R. R. Co. v. Painter*, 113 Cal. 247, [45 Pac. 320], such a determination as to the precise lands in controversy is not necessary, if there be a determination touching lands in all respects of like character. In *Southern Pacific R. R. Co. v. United States*, 189 U. S. 447, [23 Sup. Ct. 567], some of the lands were within the indemnity limits of the same branch-line grant involved in the case at bar. They were within the place limits of the Texas Pacific grant, which grant was expressly given the same precedence that was accorded to the Atlantic and Pacific grant under the act of 1866. It would seem, therefore, that the situation of the lands was identical with that here presented, and it seems so to have been regarded by the supreme court of the United States. The right to make a selection of indemnity lands within the forfeited place limits of the primary grant to the Texas Pacific Company was presented and argued. The supreme court said: "The Texas Pacific grant was declared forfeited by the act of February 28, 1885, c. 265, (23 Stats. 337,) and this forfeiture inured to the benefit of the United States. (*United States v. Southern Pacific R. R. Co.*, 146 U. S. 570, [13 Sup. Ct. 152].) It is argued further, however, that if the Southern Pacific did not get the lands in question under its primary grant it may take a part of them as indemnity lands. It is said that the company has a right to take them for that purpose if the *status* of the lands at the time of the selection permits it. (*Lyon v. Central Pacific R. R. Co.*, 99 U. S. 282.) That contention seems to have been disposed of by *Southern Pacific R. R. Co. v. United States*, 168 U. S. 1, 47, 66, [18 Sup. Ct. 18], and the practice of the land department for many years has been inconsistent with it. (*Southern Pacific R. R. Co. v. Moore*, 11 L. Dec. 534; *Moore v. Kellogg*, 17 L. Dec. 391; *Smead v. Southern Pacific R. R. Co.*, 29 L. Dec. 135.) When it is decided that the company got no title to the land within its twenty-mile limit, it would be contrary to the intimations of the cases to allow it to

take the adjoining strip outside under a claim of indemnity. (See *Bardon v. Northern Pacific R. R. Co.*, 145 U. S. 535, 545, [12 Sup. Ct. 856]; *Clark v. Herington*, 186 U. S. 206, [22 Sup. Ct. 872].) It is not clear that the language of the statute does not forbid it."

We can construe this language in no other way than as an adjudication by the highest authority upon the interpretation to be given to its decision in the 168th volume of its reports, and as the question relates to the public domain and the construction of acts of Congress, the decisions of that court are, it is unnecessary to say, binding authority upon this. For which reason the judgment and order appealed from are affirmed.

McFarland, J., and Lorigan, J., concurred.

[L. A. No. 1661. In Bank.—April 2, 1907.]

RALPH W. SCHOONOVER, Trustee, etc., of Mary E. Birnbaum, Bankrupt, Respondent, v. JAMES BIRNBAUM, Appellant.

PARTITION—FINDING OF PLAINTIFF'S OWNERSHIP—POSTPONEMENT OF SALE—LITIGATION WITH THIRD PARTY.—In an action for partition of land, of which the court found that the plaintiff was an owner of an undivided interest, the fact that the title of the plaintiff was in dispute in an action with a third party is not a reason for postponing the sale of the entire land under the interlocutory decree. Such fact was not available as ground for a plea in abatement to the action for partition, since neither parties nor subject-matter were the same in the two actions; and if, for any reason, the price realized was so low as to justify the court in concluding that the sale had not been fair to all parties concerned, confirmation would be refused and a resale ordered.

APPEAL FROM JUDGMENT—FAILURE TO FIND ON ISSUE—PRESUMPTION—EVIDENCE.—On an appeal from a judgment on the judgment-roll alone, the judgment will be affirmed if supported by findings actually made, and the want of a finding on an issue will be presumed, in the absence of a showing to the contrary, to be the result of a failure to offer any evidence in support of such issue.

APPEAL from a judgment of the Superior Court of Santa Barbara County. J. W. Taggart, Judge.

The facts are stated in the opinion of the court.

B. F. Thomas, for Appellant.

Ralph W. Schoonover, and **Richards & Carrier**, for Respondent.

SLOSS, J.—The plaintiff is trustee of the estate of **Mary E. Birnbaum**, a bankrupt. Claiming, as such trustee, to own the undivided one half of certain premises, he brought this action for partition. The defendant appeals from an interlocutory decree directing a sale of the premises. The allegations of the complaint were all found by the court to be true. Taken alone, they were sufficient to justify the granting of the interlocutory decree, and the only question is whether the relief sought should have been withheld by reason of further findings in favor of affirmative allegations made by the answer. The answer alleged that prior to the making of the order adjudging **Mary E. Birnbaum** a bankrupt, she and defendant were the owners of the premises in question as tenants in common; that while they were such owners, and in possession, said **Mary E. Birnbaum** executed and recorded a declaration of homestead upon said premises; that after the adjudication of bankruptcy, and before the commencement of this action, the plaintiff, as trustee, had commenced an action against said **Mary E. Birnbaum** to recover the undivided one half of said premises; that in that action the plaintiff had recovered judgment, from which **Mary E. Birnbaum** had appealed, her appeal being, as alleged in the answer, still pending and not likely to be determined within two years.

It is not claimed that these allegations constituted any defense to the action. The extent of appellant's contention is that the matters set up in his answer furnished ground for postponing a sale in the present suit until the action of the plaintiff against **Mary E. Birnbaum** should be finally determined. But we see no ground for upholding this view. The court found that plaintiff was the owner of an undivided

that court the following opinion was prepared by Allen, J., and that opinion is hereby adopted as the opinion of this court:—

“Action by plaintiff to enjoin the defendants from selling under execution certain real property. Findings and judgment for the defendants; a new trial denied, and from the judgment and order denying a new trial plaintiff appeals.

“Plaintiff in her complaint alleges ownership as her separate estate of a tract of land in San Bernardino County, which defendants were threatening to sell under execution to satisfy a judgment against her husband.

“The material facts involved in this appeal may be summarized as follows: Mrs. Alvira Brown, the mother of the plaintiff, loaned to the plaintiff’s husband, about the year 1865, the sum of three thousand dollars, for which plaintiff’s husband executed his note. A portion of this money was invested in real property in Illinois, which was sold and five thousand dollars realized by plaintiff’s husband therefrom. This money was reinvested by the husband in certain real property in San Bernardino County, the subject of this action, in the name of the plaintiff’s husband, who, with plaintiff, his wife, on January 1, 1898, signed a conveyance of such property to Alvira Brown, plaintiff’s mother. At the time this deed was signed Mrs. Brown was absent from California and knew nothing about its execution; although previously it had been agreed between plaintiff, her husband, and Mrs. Brown that the property should be conveyed to Mrs. Brown, who was to fix the property in plaintiff’s hands so there should be no trouble if anything should happen suddenly to the husband. Afterwards, on June 28, 1898, Hemenway and his wife acknowledged this deed, so as to entitle the same to record, and the same was placed by Hemenway on record June 29, 1898. At the time these last two conveyances were delivered, Mr. Hemenway owed one Simonsen about sixteen hundred dollars. Simonsen brought two suits against Hemenway to recover this indebtedness, in one of which actions an attachment was issued, and on June 24, 1898, the same was levied upon the property involved in this action; in the other, which involved the six hundred dollars indebtedness, no attachment was issued. Judgments in these actions were subsequently rendered, one for one

thousand dollars and one for six hundred dollars. Execution was issued out of the one-thousand-dollar judgment, and the premises described in the complaint were sold and redeemed. The judgment for six hundred dollars in favor of Simonsen was and is unpaid. At the time of the conveyances mentioned, Hemenway owed no other debts other than the debt to Simonsen and a debt claimed by him to be due Mrs. Brown on account of the original three-thousand-dollar loan and accumulated interest. Afterwards, in September of 1900, Hemenway contracted an obligation in favor of defendant Thaxter for twenty-five hundred dollars, on account of which judgment was rendered in July of 1902, out of which judgment the execution the enforcement of which is sought to be restrained issued.

"Upon the trial of this action the court found: That plaintiff was not the owner as her separate estate of the premises; that the said premises were purchased with community funds; that the conveyance by Hemenway and his wife to Mrs. Brown was a voluntary conveyance, made with intent to hinder, delay, and defraud existing and subsequent creditors; that Hemenway had existing creditors at the time; that the conveyance by Mrs. Brown to Mrs. Hemenway was voluntary and without consideration, and was made to her in furtherance of the intent of said Hemenway to hinder, delay, and defraud creditors; that Hemenway by such conveyance became insolvent and has not at any time since said conveyance had any property not exempt from execution; that the claimed indebtedness of Hemenway to Alvira Brown was a pretext only for the conveyance; that Hemenway has continued in possession ever since the conveyance; that the judgment in favor of Mrs. Thaxter is wholly unpaid. And as a conclusion of law, the court found that Mrs. Thaxter, the subsequent creditor, is not defeated of her right to attack the fraudulent transfer, and that restraining order theretofore granted should be dissolved. A decree was entered accordingly.

"It is insisted by appellant that there is no evidence warranting the finding of the court that the deed from Hemenway to Mrs. Brown and the deed from Mrs. Brown to Mrs. Hemenway were in either case fraudulent, voluntary, or without consideration, or that the same was in fraud of

creditors and void; and further, that were it to be conceded that the conveyances were in fraud of the existing creditor Simonsen, subsequent creditors could not successfully attack such conveyances under sections 3441 and 3442 of the Civil Code.

“As to the voluntary character of the conveyances, there was much conflict between the testimony and the circumstances connected with the transaction, and an examination of the record indicates to us that the finding of the court that the conveyances were voluntary should not be disturbed. A trial court may very properly determine that direct evidence is successfully rebutted by circumstances and conduct of parties inconsistent with such direct evidence. There is much in the record indicating that the claimed indebtedness of Hemenway to Mrs. Brown was a pretense only, and that the true intent of the parties by the conveyance was to vest the title in plaintiff without valuable consideration being paid therefor. There is, in fact, much in the direct testimony of Hemenway indicating this fact. He testifies that it was agreed between himself and Mrs. Brown that the property should go to the plaintiff. He further testifies that he does not know how long Mrs. Brown kept the note for three thousand dollars originally executed by him to her, and does not know whether it was taken up and destroyed in five, twenty-five, or thirty years; that he executed to Mrs. Brown many notes for other loans and had various settlements; and his only statement connecting the note with the conveyance to Mrs. Brown is that a note was surrendered by Mrs. Brown when the deed was executed; but what note it was, for what amount, and whether it was then a subsisting obligation or not, is not disclosed. That the conveyance, if voluntary, was in fraud of Simonsen scarcely requires argument. Section 3442 of the Civil Code provides that ‘any transfer . . . made or given voluntarily, or without valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors.’ Hemenway admits that by this conveyance he divested himself of all property liable to execution; that he became thereby, and has ever since remained, insolvent. The consequence of this conveyance being, then, to render Hemenway insolvent, he will be presumed to have intended its natural consequence,

from which follows an intent to become insolvent, or contemplated insolvency, in the language of the act. The finding of the court as to the insolvency of Hemenway is sufficient in its terms to establish that fact.

"There remains, therefore, only the question as to the right of a subsequent creditor to attach such conveyance upon the ground that it is also in fraud of him. The rule laid down in *Horn v. Volcano Water Co.*, 13 Cal. 62, [73 Am. Dec. 569], approved in *Banning v. Marleau*, 133 Cal. 488, [65 Pac. 964], that 'evidence of an intent to defraud existing creditors is deemed sufficient *prima facie* evidence of fraud against subsequent creditors,' has never been criticised or modified to our knowledge. Applying this rule, therefore, we must conclude that, even though fraudulent intent is a question of fact, and not of law as laid down in section 3442 of the Civil Code, where the fraud as to existing creditors is established as a question of fact, it is also established *prima facie* as to subsequent creditors. It was for the trial court to say whether this *prima facie* case had been overcome by other testimony. It determined the matter adversely to the appellant, and under the familiar rule must be accepted. The finding of the court that the conveyance was fraudulent and void, if warranted, effectually disposes of the claim of plaintiff that such conveyance vested the property in her as her own separate estate; for, being void, it was not effectual for the conveyance of any estate."

It is therefore ordered that the judgment and order be affirmed.

[L. A. No. 1638. In Bank.—April 2, 1907.]

CLEMENCE KLINE, Respondent, v. SANTA BARBARA CONSOLIDATED RAILWAY COMPANY, Appellant.

NEGLIGENCE—STREET RAILROAD—LIABILITY FOR INJURY TO PASSENGER—UTMOST CARE AND DILIGENCE—INSTRUCTIONS.—In an action by a passenger on a street railroad to recover damages for personal injuries alleged to have been caused by the negligence of the carrier, it is proper to instruct the jury that "contributory negligence on the part of a passenger cannot be presumed from the mere fact of

injury, but must be proved; on the other hand, the proof of an injury to a passenger on the car of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff tends to show that the injury was occasioned by the contributory negligence of the passenger or by inevitable casualty, or by some other cause which human care and foresight could not prevent." Such instruction is the equivalent of the rule of law enacted in section 2100 of the Civil Code, which requires of the carrier of passengers the use of the "utmost care and diligence."

ID.—MEASURE OF DAMAGES—LOSS OF TIME.—In such an action, where it appears that the passenger injured was a woman of sixty-five years of age, engaged in no gainful occupation, but capable, before the accident, of taking care of herself and accustomed to active outdoor exercise, and that the effect of the accident was to make her permanently lame, and to render her to some extent unable to care for herself, and under the necessity of hiring the services of others, it is proper to charge the jury, as one of the elements of damage, that the plaintiff was entitled to recover the value of her time while she would necessarily be disabled as the result of the injury.

ID.—EVIDENCE—INSUFFICIENT ALLEGATION OF DAMAGE.—The admission of evidence in support of such element of damage, even if the complaint was insufficient in that connection, could not have operated as a surprise to the defendant and was a harmless error, when it appears that the plaintiff had submitted before the trial to a physical examination by surgeons selected by the defendant for the purpose of ascertaining what her injuries were, and whether they had been properly treated.

ID.—OPINION OF WITNESS—SPEED OF CAR.—The refusal of the court to strike out the opinion of a witness that the car on which the plaintiff was riding was moving at an "unpardonable high rate of speed" was without prejudice, if the conceded facts were that the car had escaped all control and descended the grade at a dangerous rate of speed, which the combined efforts of motorman and conductor were insufficient to arrest or moderate.

ID.—SUFFERING OF PLAINTIFF—NON-EXPERT WITNESS.—In such action, where the injury occasioned to the plaintiff, in addition to superficial bruises, consisted of a fracture of the neck of the femur, non-expert witnesses, who had observed her during her illness, and had heard her groans and complaints, were competent to give an opinion as to her suffering.

ID.—HYPOTHETICAL QUESTION SUBSEQUENTLY ANSWERED IN SUBSTANCE.—The refusal of the court to permit an expert witness called by the defendant to answer a hypothetical question asked for the purpose of showing that the medical treatment received by the plaintiff had aggravated her injury, is harmless, if the witness, in answer to ques-

tions subsequently asked, was permitted to fully express his opinion as to the nature of the injury, the error in treating it, and the injurious results of the treatment.

APPEAL from a judgment of the Superior Court of Santa Barbara County. Felix W. Ewing, Judge presiding.

The facts are stated in the opinion of the court.

H. H. Trowbridge, Henley C. Booth, and P. F. Dunne, *Amicus Curie*, for Appellant.

W. S. Day, and John J. Squier, for Respondent.

BEATTY, C. J.—On July 26, 1903, the defendant, a street-railway corporation engaged in operating electric cars in the city of Santa Barbara, received the plaintiff, a woman sixty-five years of age, as a passenger in one of its cars at the terminus of the line, immediately in front of the old Franciscan Mission in said city. When the plaintiff boarded the car she seated herself on one of the rear outside seats, which was long enough to seat three persons comfortably, and which ran parallel with the axis of the car. Immediately in front of her was a standard carrying a hand-rail, and extending from the side steps of the car to the roof.

After the car had been under way a few yards it gained speed despite the fact that the motorman and conductor applied the brakes, which were of the hand-lever pattern, and when the car—the speed having become greatly accelerated—reached a curve nine hundred and seventy-four feet from the mission, the lurch of the car in rounding the curve threw the plaintiff from her seat to the ground, causing the injuries for which this action was brought. The action was defended upon two grounds: 1. That the loss of control of the car was due to the fact that the county of Santa Barbara shortly before the date of the accident, in applying crude oil to the roadway, had left a puddle of oil at the extreme end of the track, which had become covered with dust; that the car on which plaintiff became a passenger, being an excursion car, was run out to the end of the track to avoid interruption to the regular cars, and that thereby, without the knowledge of defendant, its officers or the car crew, its

wheels and brake-blocks had become saturated with oil, and useless as a means of controlling the car on the down grade from the mission to the curve; and 2. That the plaintiff was warned of the situation in time to have secured herself from any danger of being thrown off the car, by simply grasping the standard-post in front of her, and that having neglected this precaution she was guilty of contributory negligence.

In mitigation of damages the defendant offered to prove that the injuries resulting from the accident would have been much less serious if the plaintiff had been properly treated by the surgeon employed by her.

The case was tried by jury and a verdict returned in favor of plaintiff for eight thousand dollars. Defendant appeals from the judgment. The record here includes a bill of exceptions embodying the evidence, and the exceptions taken at the trial to the rulings of the court upon objections to evidence, and in giving and refusing requests to charge.

The cause was originally transferred for hearing to the district court of appeal, where the judgment of the superior court was affirmed. Upon petition of appellant it was ordered to a rehearing in this court, principally for the purpose of giving further consideration to the questions raised as to the correctness of two instructions given to the jury by the trial judge and approved by the district court of appeal. Besides these questions, counsel for appellant insisted at the rehearing, as they did in their petition, upon further consideration of some of their assignments of error not expressly dealt with in the opinion of the district court of appeal.

The most important of these questions in its bearing upon this case, and upon other cases likely to arise in which it will be invoked as a precedent, relates to the degree of care required to be exercised by common carriers of passengers, and the duty imposed upon such carriers in the exercise of that care.

In submitting the case to the jury the judge of the superior court gave, among others, the following instruction: "Contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved. On the other hand, the proof of an injury to a passenger on the car of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by

inevitable casualty, or some other cause which human care and foresight could not prevent, or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff tends to show that the injury was occasioned by the contributory negligence of the passenger or by inevitable casualty, or by some other cause which human care and foresight could not prevent."

The objection to this instruction is directed to the words "*occasioned by inevitable casualty or some other cause which human foresight could not prevent.*"

This is construed by counsel as requiring a degree of care which would be the utmost that the human mind is capable of imagining, and such they contend is not the law. But whatever the instruction may be held to mean, it cannot be denied that this court in a number of instances has approved it as a correct statement of the law, so that either counsel are mistaken in their construction or the rule of law is as stringent as their construction makes it. As long ago as 1859, in deciding the case of *Fairchild v. California Stage Co.*, 13 Cal. 604, Justice Baldwin, delivering the opinion of the court, quoted with entire approval the unanimous decision of the Virginia court of appeals that "passenger carriers bind themselves to carry safely those whom they admit into their coaches, *as far as human care and foresight will go, that is, for the utmost care and diligence of very cautious persons, and of course they are responsible for any, even the slightest, neglect,*" citing Story on Bailments, sections 601, 601a, where that author uses this language: "And the *onus probandi* is on the proprietors of the coach to establish that there has been no negligence whatsoever, and that the damage or injury has been occasioned by inevitable casualty *or by some cause which human care and foresight could not prevent.*"

This decision has since been approved and followed in several other similar cases, and as to the point under consideration remains unquestioned. In substance the rule there affirmed has been made statute law in section 2100 of the Civil Code, which requires of the carrier of passengers the use of the "utmost care and diligence." And this, as appears from the passage quoted from the Virginia case (*Farish v. Reigle*, 11 Gratt. 711, [62 Am. Dec. 666]), and approved by

this court, is construed to mean all the care which human foresight will suggest. In another case which was decided before the adoption of the Civil Code this court cited section 601 of Story on Bailments as authority for the rule that "carriers of passengers bind themselves to carry safely those whom they take into their coaches or cars as far as human care and foresight will go—that is, for the utmost care and diligence of very cautious persons." (*Wheaton v. North Beach etc. R. R. Co.*, 36 Cal. 593.) And in that case, the court, after stating the rule, proceeded to explain it as follows: "Whether in case of injury they have exercised such care and diligence is to be determined in view of the facts and circumstances which existed prior to the accident, and they cannot be held not to have done so because, after the accident, it may appear that it could have been avoided by precaution which a very cautious person, not knowing that the accident was about to occur, would not have taken. *But this form of expressing the rule is not more clear than the bare statement that the carrier must exercise the utmost care, diligence and foresight of a very cautious person.*" These extracts from the opinions of this court in a stage-coach case and a street-railway case, decided before the adoption of our Civil Code, show that the language of instruction 7 given in this case had not only been approved as a correct statement of the rule of law, but had been explained and construed as the equivalent, and no more than the equivalent, of the rule enacted in section 2100 of that code. It cannot be error, therefore, for a trial court, in submitting a case of this kind to the jury, to state the rule in its approved form, and if counsel have reason to fear that the jury may understand the rule so expressed, as requiring more than the utmost caution of very cautious persons, in view of the circumstances known or imputed to the knowledge of the carrier before the accident, they have the right to propose an instruction embodying the proper qualification. Other cases decided since the adoption of the code rule are in perfect accord with those previously decided. (See *Jamison v. S. J. and S. Co.*, 55 Cal. 593.) In *Treadwell v. Whittier*, 80 Cal. 574, [13 Am. St. Rep. 175, 22 Pac. 266], there is a very full review of the authorities on this point, citing not only Story on Bailments, but Cooley on Torts, and a large number of decisions of courts

in other jurisdictions, all supporting the rule in terms or substance, as it was given in this case. It was approved in terms in *Mitchell v. Southern Pacific R. R. Co.*, 87 Cal. 64, 75, [25 Pac. 245], and in the very recent case of *Boone v. Oakland Traction Co.*, 139 Cal. 490, 494, [73 Pac. 243]. Counsel contends that what was said in the two cases last cited was *dictum*, because the judgments against the carriers were reversed on other grounds. But it was not *dictum*; the point was involved in each case, and was certain to arise on the new trial which was ordered. It was therefore a point to be decided, and, being decided, became in each instance the law of the case.

Instructions couched in terms similar to those in question may have been disapproved in other jurisdictions, but here the form in which the rule was stated has been so often approved, and the means of preventing its misconstruction or misapplication are so entirely within the power of the defense in actions for damages, that this court could not with any consistency or justice set aside its previous rulings in this class of cases. The propriety of this conclusion could not be more clearly illustrated than it is by the fact that in this case counsel for the defendant asked, and the court gave, the following instruction to the jury: "5. You are instructed that while a street-railway company does not insure the absolute safety of its passengers, it is the duty of the street-railway company, and was the duty of the defendant in this case, to do all that human care, vigilance and foresight could, under the circumstances, considering the character and mode of conveyance, to prevent accident to passengers; and you are instructed that if the injury to the plaintiff was caused solely by the brakes not working and the reason of the brakes not working was oil on the track, and that the defendant did not know that such oil was on the track at the time of the accident and should not have known in the exercise of such care, vigilance and foresight, then the injury to the plaintiff was caused by a mere accident for which the defendant is not responsible and your verdict should be for the defendant." From which it appears that so far from questioning the rule at the trial, counsel for the defendant requested the court to give it in the very words complained of, with an explanation which freed it completely from the construction which they say renders it erroneous.

The following is the eighth instruction given to the jury at the request of the plaintiff:—

“8. If the plaintiff is entitled to recover, the measure of her recovery is what is denominated compensatory damages—that is, such sum as will compensate her for any injury she has sustained.

“The elements entering into such damages are the following:—

“(1) Such sum as will compensate her for the expenses, if any, she has incurred in caring for and nursing herself during any period she was disabled by the injury, not exceeding the sum of \$497;

“(2) The value of her time while she will necessarily be disabled as the result of the injury; and

“(3) Such reasonable sum as the jury shall award her on account of any pain and anxiety she may have suffered, or will necessarily suffer, by reason of her injury. The first of these elements is the subject of direct proof, and is to be determined by the jury on the evidence they have before them; but the second and third elements are from necessity left to the sound discretion of the jury, however the damages in all cannot exceed the amounts alleged in the complaint.”

It is contended that the second clause of this instruction contains an erroneous and misleading statement of the law, and that it must have led the jury to render what appellant views as a verdict excessive in amount. The evidence to be considered in determining the propriety of this instruction was to the effect that the plaintiff was a woman, sixty-five years of age, engaged in no gainful occupation, but capable before the accident of taking care of herself, and accustomed to active outdoor exercise. She lived with her married daughters, part of the time in Santa Barbara with one, and at other times in Alameda with another. The effect of the injuries sustained at the time of the accident was to make her permanently lame, and to render her to some extent unable to care for herself,—a disability continuing up to the time of the trial, and, according to the testimony of her surgeon, likely to be permanent. This would probably impose upon her the necessity of hiring the services of some one to do for her what she could no longer do for herself, and this was an element of damage which she had a right to ask the

jury to consider. The value of a person's time is the equivalent of his power to earn money in a gainful occupation, when he is so engaged, and ordinarily means nothing more. But it is not doing violence to language to say that the ability of a person to care for himself, and the practice of doing so instead of hiring the services of others, gives a value to his time, even if he is earning nothing, and, if so, the deprivation of such ability by the wrongful act of another imposes upon the wrong-doer the obligation to compensate him for the value of the time he can no longer employ in his own service. Construed in this light, the instruction was not erroneous, though it might have been more clearly expressed. The decision in *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, [66 Pac. 72], is not authority for or against the point here decided. The instruction sustained in that case was different from that here in question, but it does not follow that this instruction is therefore wrong.

Whether this element of damage was sufficiently pleaded, in view of the special demurrer of defendant, may admit of doubt. But if so, the error in admitting evidence as to the extent and permanence of the injuries sustained by plaintiff cannot have operated as a surprise to the defendant, for it appears that she had submitted before the trial to a physical examination by surgeons selected by the defendant for the purpose of ascertaining what her injuries were, and whether they had been properly treated. The error, if any, was therefore harmless.

The court did err in refusing to strike out the opinion of the witness Lutgen that the car was moving at "an unpardonable high rate of speed," but this error could have had no prejudicial effect in view of the conceded fact that the car escaped all control and descended the grade at a dangerous rate of speed, which the combined efforts of motorman and conductor were insufficient to arrest or moderate.

Numerous exceptions were taken by defendant to the admission of evidence, and refusals to strike out evidence, of the suffering endured by the plaintiff in consequence of her injuries. A bystander testified that immediately after the accident she was unable to stand and suffered intensely. Her daughter testified that when she was brought home she was unable to walk and was suffering intensely, and that she con-

tinued for days to suffer, could not be moved, etc. A trained nurse in charge of the case testified to the same thing, and the attending surgeon testified that her sufferings were severe. The objections to this line of testimony are that non-expert witnesses were allowed to give their opinions as to her inability to stand and walk and as to her suffering, and that it was error to permit them to testify to anything beyond her acts and exclamations indicative of present pain. The witness who testified she could not stand was one of those who assisted in lifting her from the ground and placing her on the car after the accident; her daughter saw her carried by four men from the car to her house. The trained nurse and the surgeon had nursed and attended her during the progress of her partial recovery. All of the evidence on the part of the defendant, as well as that of the plaintiff, was to the effect that the injury to plaintiff consisted, in addition to superficial bruises, of a fracture of the neck of the femur. In view of this undisputed evidence as to the nature of the principal injury to plaintiff, the evidence that she could not stand or walk after the accident must have been harmless, for a court ought to take judicial notice of the fact that a woman with a broken thigh-bone will scarcely be able to walk or stand alone. As to the suffering, that also would necessarily follow from such an injury. But the evidence was not incompetent. It does not require an expert to tell whether a person suffers. The appearance of a person who suffers severely is sufficient to manifest his condition to any one of ordinary intelligence and experience. These witnesses had all observed her, had heard her groans and complaints, and were competent to give an opinion as to her suffering.

There was a conflict of evidence as to whether plaintiff sustained an impacted or unimpacted fracture of the neck of the femur. The surgeon who attended her testified that it was impacted, and it appeared that he had treated her according to that diagnosis. The surgeons who examined her for defendant testified that the fracture was unimpacted, and for the purpose of showing that the treatment she had received aggravated her injury, one of these surgeons was asked two hypothetical questions, to each of which the court sustained objections. These objections, in my opinion, should

have been overruled, but here again the error was harmless, for by a mere change in the form of his questions the defendant's counsel brought out fully the opinion of the witness as to the nature of the injury, the error in treating it, and the injurious results of the treatment.

Appellant, not claiming that plaintiff's instruction number 7, above quoted, is erroneous in any particular, except that which has been already considered, makes the point that instructions were given at its request which conflict with number 7 in other material particulars. If this was so, it would not be a reason for setting aside the verdict; but there is no conflict. Defendant's instructions merely stated, rather too favorably to it, certain qualifications of the rule announced in number 7.

We have here considered all the points to which our attention has been directed in the petition for a rehearing, and do not deem it necessary to notice particularly other points made prior to the hearing in the district court of appeal. We think the record presents no material error, and the judgment is therefore affirmed.

McFarland, J., Lorigan, J., Shaw, J., Sloss, J., and Henshaw, J., concurred.

[S. F. No. 4126. In Bank.—April 2, 1907.]

UNION LUMBER COMPANY (a Corporation) et al., Respondents, v. JULES A. SIMON et al., Defendants.
JULES A. SIMON, Appellant.

MECHANICS' LIENS—FORECLOSURE—STATUTORY PROVISION FOR ATTORNEY'S FEES UNCONSTITUTIONAL.—The provision of the statute purporting to authorize the allowance of attorney's fees for the plaintiff in an action for the foreclosure of mechanics' liens is unconstitutional and void.

ID.—SUFFICIENCY OF NOTICE OF LIEN.—A notice of mechanic's lien, sufficient as to the owner, cannot be void as to third persons without knowledge of the extrinsic facts.

ID.—DESCRIPTION OF LAND TO BE CHARGED WITH LIEN—EVIDENCE OF IDENTITY.—In a notice of a claim for a mechanic's lien, the description of the property to be charged with the lien need only be such as will be "sufficient for identification," and in an action to enforce the lien evidence may be received for the purpose of determining

its sufficiency, and to identify the land sought to be charged with the land described in the notice.

ID.—IMPERFECT DESCRIPTION BY METES AND BOUNDS—GENERAL DESCRIPTION.—In a notice of a claim for a mechanic's lien, an imperfect attempt to describe the land sought to be charged by metes and bounds may be aided and rendered sufficient by a further statement in the notice that a particular person is the owner of the land, and the building erected thereon, and that the lien is claimed for materials furnished a specified contractor while such contractor was engaged in constructing the building for such owner; and in an action to enforce the lien, evidence is admissible to identify the land described in the complaint with the land so described in the notice.

ID.—FINDING—LAND NECESSARY FOR CONVENIENT USE OF BUILDING.—In such an action, a finding that the building covered a large portion of the land, and that all of the land, which had a frontage of one hundred and six feet and eight inches, and a depth of one hundred and sixty-four feet and one inch, was necessary for its convenient use and occupation, is sustained by evidence showing that the building was constructed for a hospital, having a dimension of sixty-eight feet in width and one hundred and eight feet in depth, containing "40 bedrooms for patients, and also operating-rooms, sterilizing-room, washrooms, bathrooms, nurses' dormitories, dining-rooms, and nurses' classrooms," although there was no evidence showing the particular portion of the lot upon which the building stood. From such evidence the court could determine, as a matter of general knowledge, that the entire lot was necessary for the use of the hospital.

ID.—CONSOLIDATION OF ACTIONS—ISSUE TENDERED BY ONE PLAINTIFF—FINDING.—Upon the consolidation of several actions to foreclose mechanics' liens, there is only a single action by the respective plaintiffs against the defendants, and the decision thereon is to be made as if the cause of action had been presented in a single complaint, and is to be embodied in a single set of findings, in which all facts in issue in the consolidated action are to be incorporated; and an issue as to the amount of the land necessary for the convenient use and occupation of the building, tendered in any of the original complaints, and the findings and judgment thereon, operate in favor of all of the plaintiffs in the same manner as if they had originally joined as plaintiffs in bringing the action and raising such issue.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion rendered in the district court of appeal.

Roger Johnson, for Appellant.

Pillsbury, Madison & Sutro, Barna McKinne, and J. S. Reid, for Respondent.

THE COURT.—This case was decided in the district court of appeal for the first district, within the sixty days next preceding April 18, 1906, and found its way to this court by reason of the general order made April 23, 1906, transferring all causes in which applications for rehearing were then pending. Since the decision by the court of appeal, this court has decided, in *Builders' Supply Depot v. O'Connor, ante*, p. 265, [88 Pac. 982], that our statutory provision as to the allowance of attorney's fees in this class of actions is unconstitutional and void. It follows that, in so far as the judgment allows attorney's fees, it is erroneous. We do not agree to that part of the opinion of Justice Harrison intimating that a notice of lien sufficient as to the owner may be void as to third persons without knowledge of the extrinsic facts. In our opinion the notice of lien, as a whole, contains sufficient matter of description to make it good in that respect as to all persons. In all other respects we find that the opinion of the district court of appeal is a correct exposition of the law applicable, and to that extent the same is adopted as the opinion of this court.

The judgment is modified by striking therefrom all allowances for attorney's fees, and, as so modified, is affirmed.

HENSHAW, J., dissenting.—I dissent. In eight of the claims of lien the description of the property affected was as follows: "Commencing at a point on the northerly line of Sutter Street distant thereon 137 feet and 6 inches from the westerly line of Scott Street, running thence westerly," etc. Here is admittedly a patent ambiguity in the attempt to fix the point of commencement. Conceding that the place for fixing the point of commencement is the intersection of the northerly line of Sutter Street with the westerly line of Scott Street, it cannot be declared whether the true point of commencement is distant one hundred and thirty-seven feet and six inches easterly or westerly on the northerly line of Sutter Street. There are thus certainly two points of commencement which equally answer the call in the description. This is conceded in the opinion of the appellate court,

which is by this court adopted, which declares that the difficulty in the description is the "uncertainty" as to the point of commencement. It has always been a fundamental rule of construction that such a patent ambiguity appearing upon the face of the instrument cannot be explained or aided by parol evidence. Thus, in *Brandon v. Leddy*, 67 Cal. 43, [7 Pac. 33], the description in the deed applied equally to certain lots which the grantor did own, as well as to certain lots which he did not own. This court in Bank declared: "The map referred to in the deed from Carney to Rosaria Bernal must be considered as incorporated in it. The deed therefore shows upon its face that there are two lots to which the description equally applies. From the deed itself it cannot be ascertained which lot was intended to be conveyed, and as the ambiguity is patent, resort cannot be had to parol. Our conclusion is that the deed in question is void for uncertainty of description." To like effect is *People v. Klumpke*, 41 Cal. 264. The general principle is likewise declared in Phillips on Mechanics' Liens (sec. 385), to the following effect: "A description containing a patent ambiguity will not, however, be referred to a jury, but be declared by the court to be void for uncertainty." Moreover, to aid and perfect this description it is necessary to take evidence as to the direction of an ungiven course; that is to say, it is necessary to show that the point of commencement was westerly along the line of Sutter Street from its westerly intersection with Scott Street. But this again is evidence which this court has distinctly declared cannot be received. Thus, in *Best v. Wohlford*, 144 Cal. 733, [78 Pac. 293], it is said: "If a monument is given as the starting-point evidence may be given to show its location. But if the direction of the course from that monument is not given, evidence will not be received to show what direction was intended."

In my judgment, if the description above given can be upheld as sufficient, it can be upon no other theory than that any description which in any way, and by any sort of evidence, can be made to apply to any piece of land is sufficient for identification, and this notwithstanding the command of the statute that the description in the claim of lien must in and of itself be sufficient for identification. Logically, therefore, if the description here in question is to be held sufficient,

it must be said, and by this court should be said, that a description as being the land of John Smith in the city and county of San Francisco complies with the statute if it can be shown that John Smith owned any land in San Francisco, that any structure was erected upon that land, and that the lien claimant furnished labor or material for the purposes of that structure. This may be the meaning of section 1187 of the Code of Civil Procedure, though I cannot bring myself to believe that it is. But if it is, considering the importance of the question and the very numerous cases that arise under this statute, this court should so declare.

McFarland, J., concurred in the dissenting opinion.

The following is the opinion rendered in the district court of appeal for the first district on March 13, 1906:—

HARRISON, J.—Action for the foreclosure of mechanics' liens.

Nine separate actions for the foreclosure of mechanics' liens upon certain property described in the complaint herein were brought against the defendant Simon, as the owner of the property, and the defendant Grant, as the contractor for the construction of the building for which the liens are claimed. The actions were afterwards consolidated into a single action under the above title, and after such consolidation the defendant Simon filed answers to the complaints of the several plaintiffs, and the defendant Grant filed an answer, admitting all of the allegations in the complaints. The cause was tried by the court, and judgment rendered in favor of the plaintiffs and against the defendants, declaring the amount of the unpaid portion of the contract price, together with the costs and attorneys' fees in the action, to be a lien upon the property in favor of the plaintiffs according to the respective amount of their claims, and directing its sale in satisfaction thereof. From this judgment and from an order denying a new trial the defendant Simon has taken the present appeal.

The principal point urged in support of the appeal is that the notice of their claim of lien which was filed in the recorder's office by several of the above claimants was de-

fective, in that it did not describe the property described in the complaint, and therefore that no lien was created thereon. The description of the property in the said notice of lien is as follows: "The lot or parcel of land situate in the city and county of San Francisco, state of California, bounded and described as follows, to wit: Commencing at a point on the northerly line of Sutter Street distant thereon 137 feet and 6 inches from the westerly line of Scott Street; running thence westerly along said line of Sutter Street 106 feet and 8 inches; thence at right angles northerly 164 feet and 1 inch; thence at right angles easterly 106 feet and 8 inches; thence at right angles southerly 164 feet and 1 inch to the point of commencement, and also the buildings on said land and the alterations and additions made thereto." In addition to this description the notice makes the further statement: "That Jules Simon, M. D., is the reputed owner and is, as claimant is informed and believes, the owner of the said land and said buildings, alterations and additions thereto; that said lien is claimed for material furnished by said claimant to the person named W. E. Grant at various times between on or about the 10th day of June, 1902, and the 17th day of October, 1902, and while said Grant was engaged in constructing said building and making said alterations and additions thereto for said owner."

The objection to the sufficiency of the description is that it does not specify in which direction from the westerly line of Scott Street the lot of land is located, and that it cannot be determined therefrom whether its starting-point is easterly or westerly therefrom.

The requirement of the statute that the materialman or subcontractor who claims a mechanics' lien shall file a notice thereof in the recorder's office has a twofold purpose, in addition to that of fixing the time within which he must seek to enforce his lien,—viz. to give constructive notice of the claim to all persons dealing with the property, and also to inform the owner of the amount of the claim, and thereby enable him to withhold from the contractor a sufficient amount of the contract price with which to satisfy the same. "The object of the law, so far as securing the validity of the lien against the owner is concerned, when a materialman seeks to avail himself of the advantages, is that by the notice the

owner may keep back enough of the contract price to indemnify himself against the liability." (*De Witt v. Smith*, 63 Mo. 263.) The notice which the claimant is to file is also of a twofold character. It must contain a statement of the facts which the statute prescribes for the creation of the lien, and it must also contain a description of the property to be charged with the lien. The statute is remedial, and is to be liberally construed with a view to effect its objects and to promote justice (Code Civ. Proc., sec. 4); and as the persons for whose benefit it is enacted are not presumed to be versed in accuracy of expression the notices to be given by them are to be construed more with reference to their substance than their form. (*Corbett v. Chambers*, 109 Cal. 178, [41 Pac. 873].) Whatever the statute has made essential to the creation of the lien must be fully and correctly stated (*Wagner v. Hansen*, 103 Cal. 104, [37 Pac. 195]; *Santa Monica Co. v. Hege*, 119 Cal. 376, [51 Pac. 555], but the description of the property to be charged with the lien is required to be only such as will be "sufficient for identification." The same fullness and precision of description is not required in the lien statement as in the case of a conveyance or a judgment. (*Nystrom v. London etc. Mortgage Co.*, 47 Minn. 31, [49 N. W. 394].) A false call or an inaccuracy in describing the property will not defeat the lien if the description be not in itself misleading or defective in some essential particular. (*Willamette Company v. Kremer*, 94 Cal. 205, [29 Pac. 633].) In an action for the enforcement of the lien the plaintiff is not required to follow the terms of the description which are given in the notice, but, if the statutory requirement has been satisfied, may within those terms disregard any lack of accuracy or precision, and in his complaint may enlarge the description in such manner that the judgment will distinctly specify the land which is to be sold. (*Duffy v. McManus*, 3 E. D. Smith, 657; *Willamette Company v. Kremer*, 94 Cal. 205, [29 Pac. 633]; *Corbett v. Chambers*, 109 Cal. 178, [41 Pac. 873].) Whether the description in any particular case is sufficient for identification is a question of fact to be determined by the jury or the court upon a consideration of the circumstances of that case. (Phillips on Mechanics' Liens, sec. 384.) This provision of the statute implies that evidence may be received for the purpose of determining its sufficiency (*Best*

v. *Wohlford*, 144 Cal. 733, [78 Pac. 293]), and such evidence will include the purpose for which the description is required as well as the persons who are to be affected by it. A more precise and specific description is required for the purpose of giving constructive notice to persons who may deal with the property or become purchasers or encumbrancers of the same (*Montrose v. Connor*, 8 Cal. 344; *Rall Bros. v. McCrary*, 45 Mo. App. 365; *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, [50 Pac. 744]), than would be required in a case where only the owner and other lien claimants are interested. (*Martin v. Simmonds*, 11 Colo. 411, [18 Pac. 535]; *Putnam v. Ross*, 46 Mo. 337.) Mr. Phillips says (sec. 379): "If there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. There is great reluctance to set aside a mechanic's claim merely for loose description, as the acts generally contemplate that the claimants should prepare their own papers; and it is not necessary that the description should be either full or precise. If the description identifies the property by reference to the facts, that is, if it points clearly to a piece of property and there is no other one that will answer the description, it is sufficient." Among the identifying facts which are held competent to be considered for determining its sufficiency are references to adjoining properties, a description of the building which has been constructed, the fact that the land upon which it is erected is the only property of the owner in that locality. (*Tibbets v. Moore*, 23 Cal. 208; *Knabb's Appeal*, 10 Pa. St. 186, [51 Am. Dec. 472]; *Kennedy v. House*, 41 Pa. St. 39, [80 Am. Dec. 594]; *McClintock v. Rush*, 63 Pa. St. 203; *Rall Bros. v. McCrary*, 45 Mo. App. 365; *Russell v. Haydon*, 40 Minn. 88, [41 N. W. 456]; *Lombard v. Johnson*, 76 Ill. 599.)

In view of these principles it must be held that the finding of the superior court that the description of the property in the plaintiff's notice of its claim of lien was sufficient must be sustained. The controversy herein does not affect the rights of any outside person; only the rights of the lien claimants and the owner are involved, and unless the description was such as to mislead the owner any mere lack of accuracy therein is not available as a defense. The notice

does not give a specific description of other property than that sought to be charged with the lien as described in the complaint, as was the case in *Fernandez v. Burleson*, 110 Cal. 164, [52 Am. St. Rep. 75; 42 Pac. 566], and its terms are not such as to make it impossible to locate the property with such aids as are competent for that purpose. (*Cleverly v. Moseley*, 148 Mass. 280, [19 N. E. 394].) Its sole defect consists in the uncertainty of the starting-point for its boundary; but under the other facts set forth in the notice and the evidence given in connection therewith this uncertainty disappears.

The property described in the notice is a rectangular lot of land situate on the northerly side of Sutter Street, with a frontage thereon of one hundred and six feet and eight inches, and a depth of one hundred and sixty-four feet and one inch. It is stated in the notice to be the lot upon which the defendant Grant between the months of June and October in the year 1902 was engaged in constructing a building for the defendant Simon, and for the construction of which the plaintiffs furnished to Grant the materials for which the liens are claimed; and that the defendant Simon was the owner of the said lot of land and of the buildings. It was shown at the trial that in May, 1902, the defendant Simon, as owner, and the defendant Grant, as contractor, entered into a contract, which was filed for record in the recorder's office, for the construction of a three-story frame hospital building, sixty-eight feet wide by one hundred and eight feet deep, to be erected upon a lot of land of the aforesaid dimensions, situate on the north side of Sutter Street, one hundred and thirty-seven and one half feet from the northwest corner of Scott and Sutter streets, and that on January 3, 1903, the defendant Simon filed in the recorder's office his verified notice, stating that the said contract with Grant had been completed and the work accepted by him, and that the property on which said building is situated is a lot of land situate on the north side of Sutter Street, one hundred and thirty-seven and one half feet *west of Scott Street*, and thence running westerly along said line of Sutter Street one hundred and six feet and eight inches, with a depth northerly of one hundred and sixty-four feet and one inch. Scott Street was shown to be sixty-eight feet in width, and to assume that

the starting-point of the description is east of Scott Street would locate a large portion of the lot within the lines of Scott Street. It was also shown that the said building is the only one ever constructed by the defendant Grant for the defendant Simon, and the latter defendant testified that he never owned any other real estate in the city and county of San Francisco. These facts sufficiently identified the property described in the notice of lien with that described in the complaint. The description in the notice is the same as that in the contract between Simon and Grant; and in his notice of completion and acceptance Simon states that the building is situate on the land which is above described in the complaint, and he testified that this is the only real estate which he ever owned in San Francisco. It is manifest, therefore, that he had no difficulty in identifying the property sought to be charged by the lien, and that he was in no respect misled by the description. In *Rall Bros. v. McCrary*, 45 Mo. App. 365, a case which involved only the rights of the lien claimant against the owner, the statute authorized a lien upon the building and the land upon which it is situated to the extent of one acre. In the claim of lien the property was described as "a frame barn and one acre upon which it is situate, being erected upon a tract of 64 acres" (describing the quarter-section). To the objection that the description failed to specify the particular acre, the court said (p. 371): "The owner of the particular tract of land described in the lien paper on which the barn was standing, for the improvement of which the materialman furnished the lumber, must be presumed to be familiar with not only the boundaries of his land but the building thereon situate which he had erected or improved by the use of the material furnished. The description of the land and the other facts stated in the lien paper were certainly ample for the purposes of enabling the defendants or their intestate to locate and identify the acre of land which it was sought to charge with the lien." (See, also, *Oster v. Rebeneau*, 46 Mo. 595; *Seaton v. Hixon*, 35 Kan. 663, [12 Pac. 22].)

The appellant suffers no hardship from the judgment herein. By his contract for the construction of the building he was under obligation to pay to the contractor the amount of the contract price therefor, and whether he pays it to the con-

tractor or to the plaintiffs as creditors of the contractor is immaterial to him if he is protected against any further liability therefor. The contractor is, however, a defendant herein, and having admitted in his answer the rights of the plaintiffs to the money due from the appellant on the contract is estopped from again demanding the same.

The liability of the appellant for the costs of the action and the attorneys' fees is the result of his own conduct. At the commencement of the action he could have tendered and paid into court the amount then unpaid of his liability to the contractor, and thereby discharged himself of further liability; but instead thereof he contested the right not only of the lien claimants but also of the contractor to any portion of said unpaid amount, and necessitated the litigation which followed. The court, therefore, did not err in requiring the payment of the costs and attorneys' fees in addition to the amount which he had agreed to pay to the contractor. (*De Camp Lumber Co. v. Tollhurst*, 99 Cal. 631, [34 Pac. 438].)

The court found that the building covers a large portion of the lot, and that all of the lot is necessary for the convenient use and occupation of the building, and directed a sale of the entire lot for the satisfaction of the liens. It is urged by the appellant that as there was no evidence showing the particular part of the land which was covered by the building, the above finding is not sustained by the evidence. It appeared from the evidence that the building was constructed for a hospital, and that by the plans and specifications for its construction its dimensions are sixty-eight feet in width and one hundred and eight feet in depth; that it contained "over 40 bedrooms for patients, and also operating-rooms, sterilizing-rooms, washrooms, bathrooms, nurses' dormitories, dining-rooms, and nurses' classrooms." Although the bill of exceptions does not show the particular portion of the lot upon which the building stands, it may be assumed that this appeared from the plans and specifications which were before the court; and as the character of the building, as well as its dimensions and the purpose for which it was to be used, was also in evidence, the court could determine without any further evidence that the convenient use of a hospital building would require more than the mere ground which is covered by the building, and, in determining the amount of additional

land required for such purpose, could exercise its own judgment as upon a matter of general knowledge. We cannot say from anything that appears in the record that the court committed any error in the extent of land which it deemed essential for the convenient use and occupation of the building.

The further objection that the finding was erroneous for the reason that in some of the complaints there was no averment upon that issue is without merit. Upon the consolidation of the several actions there was presented only a single action by the respective plaintiffs against the defendants, and the decision thereon was to be made as if the cause of action had been presented in a single complaint, and was to be embodied in a single set of findings in which all facts in issue in the consolidated action were to be incorporated. (*Wilmington Co. v. College Co.*, 94 Cal. 229, [29 Pac. 629].) This issue affected the rights of each of the plaintiffs, and its presentation in any of the original complaints became an issue in the consolidated action, and the finding and judgment thereon operated in favor of all of the plaintiffs in the same manner as if they had originally joined as plaintiffs in bringing the action with this averment in their complaint.

The objection to the judgment upon the ground that it creates a personal liability against the appellant is not sustained by the record.

The judgment and order denying a new trial are affirmed.

Cooper, J., and Hall, J., concurred.

[S. F. No. 4701. In Bank.—April 2, 1907.]

ROSA BLOOM, Respondent, v. PAULINE GORDAN et al.,
Appellants.

APPEAL—INTERLOCUTORY JUDGMENT IN PARTITION—DISMISSAL.—Under subdivision 3 of section 939 of the Code of Civil Procedure, an appeal from an interlocutory judgment in actions for partition of real estate must be taken within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk. An appeal taken subsequent to such limitation, although within sixty days after the date of the entry in the judgment-book, will be dismissed.

MOTION to dismiss an appeal from an interlocutory judgment in partition of the Superior Court of the City and County of San Francisco. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

William T. Kearney, for Appellants.

Otto I. Wise, for Respondent.

THE COURT.—This is a motion to dismiss the appeal of certain defendants from the interlocutory judgment given in an action for the partition of real property. It is shown by the affidavit of the county clerk that the interlocutory decree in partition and order of sale were entered in the minutes of the court upon December 23, 1905. The interlocutory decree in partition and order of sale were filed with the clerk of the said superior court upon the ninth day of January, 1906. Admittedly, the appeal was not taken until the 18th of March, 1906. Subdivision 3 of section 939 of the Code of Civil Procedure declares that an appeal may be taken from an interlocutory judgment in actions for partition of real estate within sixty days after the order of [or] interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk. The only answer made to this motion is the affidavit of W. T. Kearney, attorney for appellants, who declares, "that an interlocutory order or decree in partition and order of sale and accounting in the above-entitled action was entered January 28, 1906." From the explanation which was given upon the argument we conclude that the affiant here means the date of the entry in the judgment-book and not the date of entry in the minutes. But if there be a conflict in the evidence upon this point, it must be resolved in favor of the positive testimony of the clerk of the superior court with the corroborative affidavit of attorney for respondent.

Whether the time for appeal be considered as beginning to run from the date of the entry in the minutes (December 23, 1905), or from the date of the filing with the clerk of the court (January 9, 1906), from either point of time the appeal taken upon March 18, 1906, was too late. (*Bartlett v. Mackey*, 130 Cal. 181, [62 Pac. 482].)

The appeal is therefore dismissed.

[L. A. No. 1580. In Bank.—April 2, 1907.]

**JAMES A. BLOOD, Sr., Respondent, v. LA SERENA LAND
AND WATER COMPANY et al., Appellants.**

NEW TRIAL—MOTION ON MINUTES OF COURT—SUBMISSION WITHOUT ARGUMENT—REVIEW ON APPEAL FROM ORDER AND JUDGMENT—STATEMENT OF CASE.—Where the record on appeal from an order denying a new trial shows that the statement, which contained no copy of the notice of intention to move for a new trial, was settled and filed subsequent to the date on which the order was made, it must be inferred that the motion for a new trial was made on the minutes of the court; and under section 661 of the Code of Civil Procedure, the appellate court, on an appeal from such order, can review only the matters presented and argued to the lower court in support of the motion. And where the record affirmatively shows that the motion was submitted without argument it cannot be presumed that any of the grounds of the motion were argued, and the order of the trial court in denying the motion cannot be reviewed, and must be sustained without an examination of the evidence. Such statement may, however, be used on appeals from the judgment taken within sixty days after its rendition, for the purpose of determining the sufficiency of the evidence to support the findings.

CORPORATION — UNPAID SUBSCRIPTIONS — SUIT BY CREDITORS. — A court of equity, at the instance of a creditor or creditors of an insolvent corporation, has jurisdiction to compel its stockholders to pay their subscriptions in order to satisfy the corporate debts.

ID.—CREDITOR AS STOCKHOLDER—SET-OFF—RATABLE CONTRIBUTION. — A creditor of a corporation who is himself a stockholder, and indebted to the corporation for unpaid subscriptions, may maintain an action against other stockholders to enforce their liability on their subscriptions, and cannot be compelled to set off his liability on his own subscription against the indebtedness of the corporation due him. In such an action the plaintiff stockholder must contribute ratably with the defendant stockholders towards the liquidation of his demand against the corporation.

ID.—LIABILITY OF STOCKHOLDERS—JOINDER OF PARTIES—EXTENT OF RECOVERY.—The liability of the stockholders for unpaid subscriptions is several, and in a suit by a creditor of the corporation to enforce such subscriptions, it is not necessary to join all of the stockholders, and the creditor is not limited in his recovery to the amount represented by the proportion which the defendants' unpaid subscriptions bears to all unpaid subscriptions. The creditor may sue any one stockholder and recover from him his total debt, provided it does not exceed the amount of the defendant's liability for subscriptions. No different rule applies when the plaintiff himself is a stockholder.

ID.—BRINGING IN OTHER STOCKHOLDERS.—In an action by a creditor stockholder against some of the stockholders of a corporation to enforce their liability for unpaid subscriptions, if the presence of the other stockholders was necessary to a complete adjudication of the rights of the parties, and a determination of the amount ultimately due from each, the defendants should have taken steps to have had such other stockholders brought in.

APPEALS from a judgment of the Superior Court of Santa Barbara County and from an order refusing a new trial. Felix W. Ewing, Judge presiding.

The facts are stated in the opinion of the court.

Richards & Carrier, Booth & Barnett, W. J. Barnett, and Gray & Cooper, for Appellants.

W. S. Day, for Respondent.

SLOSS, J.—The plaintiff, a judgment creditor of La Serena Land and Water Company, a corporation, brought this action against the corporation and certain holders of its capital stock to recover from the individual defendants the unpaid subscriptions on their stock and to apply the same in satisfaction of his judgment. The plaintiff had brought an action against the corporation to foreclose a mortgage, and obtained a decree of foreclosure. (See *Blood v. La Serena L. and W. Co.*, 113 Cal. 221, [41 Pac. 1017, 45 Pac. 252]; s. c., 134 Cal. 361, [66 Pac. 317].) The mortgaged property sold for an amount less than was due on the mortgage, resulting in the docketing of a deficiency judgment against the corporation for \$22,105.97.

The present action was dismissed as to the defendant Wells. The court found that the defendant McDuffie had, prior to the commencement of the suit, assigned his stock to the plaintiff. Judgment went against the corporation and the remaining four defendants, James L. and Martha S. Barker, James W. Orr, and R. W. Evans. Said defendants moved for a new trial, which was denied, and now appeal from the order denying their motions and from the judgment.

The only ground urged in support of the appeals from the order denying the new trial is the insufficiency of the evidence

to sustain certain findings. The respondent contends that there is no sufficient record on which to review the action of the lower court in refusing a new trial. This contention, we think, must be sustained. The transcript contains merely (in addition to the judgment-roll) a statement of the case and the order of the court denying the motions. The statement, which contains no copy of the notices of intention to move for a new trial, was settled March 12, 1904, and filed March 14, 1904. The order denying the motions for a new trial was made and entered February 5, 1904,—more than a month before the settlement or the filing of the statement. It is obvious, therefore, that the motions for new trial must have been made on the minutes of the court, since such motions, if made upon affidavits, upon a bill of exceptions, or upon a statement of the case, cannot be heard until “after the affidavits, bill of exceptions, or statement, as the case may be, are filed.” (Code Civ. Proc., sec. 660.)

Where the motion is made on the minutes of the court, the record on appeal consists of the judgment-roll, “and a statement to be subsequently prepared, with a copy of the order.” (Code Civ. Proc., sec. 661.) The same section provides that in cases of such motions “the statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as shall be necessary to explain them; and it shall be the duty of the judge to exclude all other evidence or matter from the statement.” The evident intent of this provision is that where there is an appeal from an order granting or denying a motion for new trial made on the minutes of the court, the review by the appellate court shall extend only to the matters presented and argued to the lower court in support of the motion. Other grounds are not to be regarded as justifying or requiring the granting of such motion. And there is good reason for this limitation. Where a party moves for a new trial without having first prepared and presented a record, whether by way of affidavits, bill of exceptions, or statement, it is only fair to the court which is asked to grant a new trial upon its recollection of the proceedings, that its attention be specifically directed to the matters in which error is claimed to have been committed. But whether the provision of section 661 is founded in good reason or bad, its language is clear and unambiguous. The

statement is to contain only the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain those grounds. (*Leonard v. Shaw*, 114 Cal. 69, [45 Pac. 1012].) Everything else is to be excluded from the statement. If other matter should happen to be incorporated, it is surplusage, and must be disregarded. It follows that, where a motion for new trial, made on the minutes of the court, is submitted without any ground being argued, and is denied, there is nothing which can properly be incorporated in a statement, and nothing on which the appellate court can base a review of the order made. It is true that where specifications of error, or of insufficiency of evidence are set out in the statement, it will be presumed that they were in fact argued. (*Schneider v. Market-Street Ry. Co.*, 134 Cal. 482, [66 Pac. 734]; *Roberts v. Hall*, 147 Cal. 434, [82 Pac. 66].) But no such presumption can be indulged where the record affirmatively shows that the fact is otherwise. In the present case the order denying the motions for new trial (which is, under section 661 of the Code of Civil Procedure, a part of the record on appeal) recites that the motions were submitted "without argument." In the face of this, we cannot presume that any of the grounds were argued. The statement, therefore, could not properly contain any ground of motion for new trial, nor any evidence applicable to any ground. There is nothing before the court on which to review the ruling of the trial court in denying the motion, and its order must be sustained without an examination of the evidence.

Being limited, therefore, to a consideration of the appeals from the judgment, we are to determine whether the findings made by the court support the judgment. The essential facts found are the following: The corporation was organized in 1887 with a capital stock of three hundred shares of the par value of five hundred dollars per share. Of this number two hundred and ten shares were subscribed and outstanding. On these it is found that only fifty per cent of the subscription price had been paid. At the time of the commencement of the action plaintiff was the owner of one hundred and thirty shares, on which there is due for unpaid subscriptions thirty-two thousand five hundred dollars, and the four individual defendants against whom judgment went were the owners of

forty-two shares, on which there is due for unpaid subscriptions ten thousand five hundred dollars. The remaining thirty-eight shares were held by parties not before the court. The findings show the judgment against the corporation above referred to, and declare that said corporation ever since the date of the judgment against it has been insolvent, and that it had no assets other than the property sold under foreclosure and the unpaid subscriptions of its stockholders. As conclusion of law the court found "that the plaintiff, being himself a debtor of said corporation, should contribute ratably with the defendants James L. Barker, Martha S. Barker, James W. Orr, and R. W. Evans toward the discharge of his said demand against said corporation; and the defendants James L. Barker, James W. Orr, Martha S. Barker and R. W. Evans must each contribute proportionately with the plaintiff toward the discharge of the plaintiff's demand against the corporation." Judgment was entered against the corporation and the said individual defendants in accordance with said conclusion of law.

The jurisdiction of a court of equity, at the instance of a creditor or creditors of an insolvent corporation, to compel its stockholders to pay their subscriptions in order to satisfy the corporate debts, is well established. (*Harmon v. Page*, 62 Cal. 448; *Baines v. Babcock*, 95 Cal. 581, [29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776]; *Walter v. Merced Academy Assn.*, 126 Cal. 582, [59 Pac. 126]; *Welch v. Sargent*, 127 Cal. 72, [59 Pac. 319].)

The only question in this case is how far the plaintiff's right of recovery is affected by the fact that he himself is a stockholder of the corporation, and is indebted to it for unpaid subscriptions. It is contended by the appellants that inasmuch as plaintiff's liability for unpaid subscriptions exceeded the amount of his claim against the corporation, such liability should be set off against his claim and no recovery be allowed at all. But this position, we think, cannot be sustained. While the corporation is a party defendant to the suit, it is not an indispensable party (*Potter v. Dear*, 95 Cal. 578, [30 Pac. 777]), and the action is primarily against the defendant stockholders to recover from them amounts due the corporation which are properly applicable to the payment of the debts of the corporation. Such individual

defendants do not stand in the position of the corporation itself, and should not be permitted to set off against their indebtedness claims due from the plaintiff to the corporation. It has been held in other jurisdictions that a creditor of a corporation who is himself a stockholder, and therefore liable for unpaid subscriptions, may, without fully paying his own subscription, maintain an action against other delinquent stockholders to enforce payment of a judgment obtained by him against the corporation. (*Bissit v. Kentucky River Navigation Co.*, 15 Fed. 353; *Wilson v. Kiesel*, 9 Utah, 397, [35 Pac. 488].) No decision to the contrary has been called to our attention, and we think these cases declare the proper rule. The plaintiff as a creditor is entitled to look for the satisfaction of his debt to the fund composed of the unpaid subscriptions of the stockholders. As a stockholder owing a subscription he is bound to apply this subscription toward the satisfaction of the debts of the corporation. But there is no reason why, merely because he unites in his own person the two characters of creditor and stockholder, he should, as stockholder, be compelled to bear the entire burden of satisfying his own claim, for which other stockholders are equally liable. The just and equitable rule appears to us to be that declared in *Bissit v. Kentucky River Navigation Co.*, 15 Fed. 353, and *Wilson v. Kiesel*, 9 Utah, 397, [35 Pac. 488],—i. e. that in such case the plaintiff stockholder must contribute ratably with the defendant stockholders toward the liquidation of his demand against the corporation. This was the principle applied by the trial court as enunciated in the conclusion of law above quoted. Under it the court ascertained the total amount of the plaintiff's claim, and apportioned the payment of that claim among the plaintiff and the defendants in proportion to the amounts respectively due from them for unpaid subscriptions.

It is contended by the appellants that if such rule of contribution be proper, it should only be applied as among all of the stockholders, not merely among those who are parties to the action; that the plaintiff is entitled to recover from the defendants, not the proportion which their unpaid subscriptions bear to the sum of his and theirs, but only the proportion which their unpaid subscriptions bear to the total unpaid subscriptions owed by all stockholders of the corpora-

tion. We think, however, that this view is inconsistent with the rule declared in *Baines v. Babcock*, 95 Cal. 581, [29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776], and the cases following it. In *Baines v. Babcock* it was held, following the decision in *Hatch v. Dana*, 101 U. S. 205, that in a suit to enforce the payment of such subscriptions it is not necessary to join all of the stockholders. The following language from the opinion in *Hatch v. Dana* was quoted: "The liability of a stockholder for the capital stock of a company is several and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers. And in equity his liability does not cease to be several." The same rule was applied in *Walter v. Merced Academy Assn.*, 126 Cal. 582, [59 Pac. 136]. (See, also, *Welch v. Sargent*, 127 Cal. 72, 80, [59 Pac. 319].) Under these cases a creditor is not limited in his recovery to the amount represented by the proportion which the defendants' unpaid subscription bears to all unpaid subscriptions. He may sue any one stockholder and recover from him his total debt, provided it does not exceed the amount of the defendants' liability for subscription. We cannot see why a different rule should be applied when the plaintiff himself is a stockholder. The fact that he himself is indebted for unpaid subscriptions merely furnishes a reason for equitably adjusting the liabilities of the parties before the court. The purpose of the action is not to wind up the affairs of the corporation and adjust the rights of all the stockholders. (*Hatch v. Dana*, 101 U. S. 205.) It is merely to subject to the payment of the plaintiff's demand the amount owed to the corporation by the defendants before the court. As between them and the plaintiff it appears that there are equities which require the plaintiff to meet the payment of a portion of his demand. The argument that it is unjust to compel the defendants to pay an amount which might have been recovered from other stockholders if they had been made parties, applies with equal force to the case where the plaintiff is a stranger to the corporation as where he is himself a stockholder. The liability of the defendants being several, the court properly adjusted the equities as between the parties before it.

It may be observed further that the defendants made no motion to have the remaining stockholders brought in. On the face of plaintiff's complaint it did not appear that he was a stockholder. He brought his action against certain stockholders as, under the doctrine of *Baines v. Babcock*, and similar cases, he had a right to do. The defendants set up, by way of defense, the fact that he as a stockholder was also indebted to the corporation. If the presence of the other stockholders was necessary to a complete adjudication of the rights of the parties, and a determination of the amount ultimately due from each, the defendants should have taken steps to have had such other stockholders brought in. (*Hatch v. Dana*, 101 U. S. 205.)

The judgment and order appealed from are affirmed.

Angellotti, J., Shaw, J., McFarland, J., Henshaw, J., and Lorigan, J., concurred.

A petition for a rehearing having been filed, the following opinion was rendered thereon on May 2, 1907:—

THE COURT.—In their petition for rehearing, the appellants urge that the statement on motion for new trial may be considered by this court on the appeals from the judgment, even though such statement cannot be resorted to for the purpose of reviewing the orders denying a new trial. (Code Civ. Proc., sec. 950; *Wall v. Mines*, 126 Cal. 136, [60 Pac. 682]; *Kelly v. Ning Yung Assn.*, 138 Cal. 602, [72 Pac. 148]; *Vinson v. Los Angeles Pac. R. R. Co.*, 141 Cal. 151, [74 Pac. 757].) Some of these appeals from the judgment were taken within sixty days after the rendition of the judgment, and, as to them, the statement may be used for the purpose of determining the sufficiency of the evidence. (Code Civ. Proc., sec. 939; *Pease v. Fink*, 3 Cal. App. 371, [85 Pac. 657].)

Recognizing the soundness of this position of the appellants, which was not advanced when the appeals were submitted, we have carefully examined the evidence shown in the statement. This examination satisfies us that the findings complained of are fully supported by the evidence. In view of this conclusion, there is no good reason for further considering the case, and the petition for rehearing is denied.

[L. A. No. 1682. In Bank.—April 2, 1907.]

G. S. BELL, Respondent, v. SAMUEL B. ADAMS, Appellant; and MRS. NELLIE WILLIAMS, and JOHN T. WRIGHT, Respondents.

PLEADING—COMPLAINT ON JOINT AND SEVERAL CONTRACT—TRIAL AND JUDGMENT AGAINST ONE DEFENDANT.—A complaint in an action against several defendants, alleging the employment of the plaintiff, and that the defendants agreed to pay him for his services the reasonable value thereof in a sum specified, is based upon a joint and several contract, and under sections 414 and 579 of the Code of Civil Procedure, the court was authorized to proceed with the trial against a single defendant who had voluntarily appeared, and to render judgment against him.

ID.—DENIAL OF CONTRACT BY SINGLE DEFENDANT—SUFFICIENCY OF FINDINGS.—In such an action, where the defendant appearing separately answered, denying the contract as set out, and denying that he ever agreed to pay for such services, or that they were ever rendered, or that they were of the value alleged or any value in excess of a smaller sum which was claimed to have been paid, findings that the contract set out was entered into between the plaintiff and the defendant appearing, and that such defendant agreed to pay the reasonable value of the services, and that the same were rendered and were of the value as alleged in the complaint, and that such defendant had paid no part thereof, are not at variance with the issues raised by the pleadings, and are sufficient to sustain a judgment against such defendant.

ID.—APPEAL FROM JUDGMENT—FINDING OF NON-PAYMENT BY SINGLE DEFENDANT.—Upon an appeal from the judgment upon the judgment-roll alone, the language of findings is to be given the broadest possible meaning, whenever it is necessary to do so in order to support the judgment; and the finding that the defendant who had appeared had not paid for the services is equivalent to a finding that the same had not been paid, either by himself in person or by his co-obligors.

ID.—STATUTE OF LIMITATIONS—WHEN FINDING UNNECESSARY.—No finding on a plea of the statute of limitations is necessary to support a judgment against the defendant, where the admitted facts demonstrate that a finding thereon could not have been otherwise than against him.

APPEAL from a judgment of the Superior Court of Los Angeles County. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Hubert T. Morrow, Oscar C. Mueller, and Sidney J. Parsons,
for Appellant.

C. C. De Garmo, and E. H. Wilson, for Respondent.

SHAW, J.—This case was transferred to the district court of appeal of the second district, and that court being unable to agree upon a decision, it was again transferred to this court. The following opinion prepared by Mr. Justice Allen of that court meets with our approval, and is adopted as the opinion of this court:—

“Appeal by defendant Samuel B. Adams from a money judgment rendered against him alone in favor of the plaintiff.

“The complaint alleges a contract between plaintiff and defendants, by which plaintiff was to manage and operate certain mines belonging to the defendants, for which services defendants agreed to pay the reasonable value thereof, which is alleged to be four thousand dollars, whenever the defendants sold the mines. It is further alleged that within a year preceding the bringing of the action defendants sold said mines. Non-payment of such claim for services is alleged. Service of process does not appear from the record to have been made upon any of the defendants. Defendant Adams, however, appeared and answered separately, denying the contract as set out, and denying that he ever agreed to pay for such services, or that such services were ever rendered, or that the same were of the value alleged, or any value in excess of seven hundred and ten dollars, which amount is claimed to have been paid; admits the sale of the mines as alleged. A plea of the statute of limitations is also interposed.

“The trial court found that the contract set out was entered into between plaintiff and defendant Adams, and that Adams agreed to pay therefor the reasonable value of the services rendered, when the mines were sold; that the same were rendered as alleged in the complaint, and were of the value of four thousand dollars; and that said Adams had paid no part thereof. Judgment was rendered accordingly.

“The principal point relied upon by the appellant is that the action being against all defendants jointly, the findings do not respond to the case made by the pleadings, in that they do not find as to the making of a contract, or the per-

formance of services, or non-payment as alleged; nor is there any finding upon the issue of the statute of limitations. The joint ownership by defendants of the mines, their sale, and the agreement of defendants to pay for the services of the plaintiff are not denied; the denial in the last regard being merely that Adams did not agree to pay therefor. The contract set out in the complaint was joint and several. (Civ. Code, sec. 1659.) Section 414 of the Code of Civil Procedure provides that when the action is against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed to judgment against the defendant served, etc. No objection appears from the record to have been made in the court below to proceeding with the trial as against the answering defendant alone; and under section 579 of the Code of Civil Procedure the court was authorized to render judgment. (*Kelly v. Plover*, 103 Cal. 36, [36 Pac. 1020].) The precise question involved here was decided adversely to appellant's contention by this court in *McKee v. Cunningham*, 2 Cal. App. 684, [84 Pac. 260]. Nor is such decision in conflict with the various decisions cited by appellant, which have reference to the character of the action as applied to its subject-matter. The admitted facts demonstrate that the findings as to the statute of limitations could not have been otherwise than against appellant; they establish the conclusion that the statute has not run, and a finding thereon was not necessary to support a judgment. (*Lewis v. Adams*, 70 Cal. 403, [59 Am. Rep. 423, 11 Pac. 833]; *Winslow v. Gohransen*, 88 Cal. 451, [26 Pac. 504].) The finding of the court as to non-payment is positive as to the appellant-defendant, which must be taken as including payment by him, or by any other person for him or his benefit, either associated with him in the joint enterprise or otherwise."

A more particular statement than is made in the foregoing opinion will show that there is no variance with respect to the contract alleged and that stated in the findings. It is not necessary in every case that there should be findings upon all the allegations of the complaint. The findings must respond to the issues only, and the true rule is that there must be a finding upon every material fact alleged in the complaint and controverted by the answer, provided it is necessary to

support the judgment rendered in the action. The findings in this case conform to this requirement. The complaint alleges that "the *defendants* agreed to pay plaintiffs" for the services,—that is, in effect, that all three defendants so agreed. The answer denies that the defendant Adams so agreed, and is silent in regard to the fact that the other defendants agreed to pay. Every fact not denied by the answer is admitted to be true, and hence the case was submitted with the admission that the other two defendants had agreed as alleged, leaving the court to find only as to whether or not Adams had agreed. The finding that Adams did agree to pay the plaintiff exactly covered the issue in this respect, so that, together with the admission, it was fully established that all the defendants had agreed as alleged in the complaint. As Adams alone had then appeared, judgment was properly given against him alone.

With respect to the finding of non-payment, the rule applies that upon an appeal from the judgment, upon the judgment-roll alone, the language of the findings is to be given the broadest possible meaning, whenever it is necessary to do so in order to support the judgment. If, by any usage of the English language, the finding that Adams has not paid for the plaintiff's services can be construed to imply that the debt to the plaintiff remains unpaid, then upon this appeal the finding is sufficient on that point. A payment by one joint obligor is, in contemplation of law and so far as the obligee is concerned, a payment by all. Each joint obligee is in law the agent of the others to make such payment. If one of the others had in fact paid the plaintiff, he would have paid for Adams as well as himself, and it would be a legal truth that Adams had paid. So the statement that Adams has not paid, in its broadest sense, is a statement that he has not paid either in person or by his co-obligors. So understood, it means that none of them has paid, and that the debt remains unpaid. This form of statement might be insufficient in a pleading, if the objection were raised by demurrer, but it is sufficient in a finding upon an appeal from the judgment-roll alone.

The judgment is affirmed.

Sloss, J., Angellotti, J., McFarland, J., Henshaw, J., and Lorigan, J., concurred.

[L. A. No. 1781. In Bank.—April 2, 1907.]

B. W. HAMLIN, Appellant, v. PACIFIC ELECTRIC RAILWAY COMPANY, Respondent.

NEGLIGENCE—STREET RAILWAY—DUTY OF TRAVELER ON TRACK—REASONABLE CARE.—One riding or walking along the track of a street-railway company must use reasonable care in the exercise of his faculties of sight and hearing to watch and listen for cars going in either direction. A failure to hear or see the car is not, *per se*, proof of negligence in all cases. Whether such exercise of the faculties as, under all the circumstances of the case, was reasonable, would have averted the injury is a question of fact. The degree of vigilance to be exercised by the person on the track is to be determined by the jury, and not laid down as matter of law, wherever the question of contributory negligence is proper to be submitted to the jury at all.

ID.—BICYCLE RIDER — INSTRUCTION — CONTRIBUTORY NEGLIGENCE—EVIDENCE.—In an action by one riding a bicycle along the track of a street railway, to recover for personal injuries inflicted by a car of the defendant, an instruction to the jury which required the exercise by the plaintiff of a greater degree of care than the law demanded is without prejudice, and will not warrant a reversal of a judgment for the defendant, when the undisputed evidence contained in the record on appeal showed that the plaintiff's conduct while so riding was so lacking in every element of proper care for his own safety that the court would have been bound to set aside any verdict based upon a finding that he had not been guilty of contributory negligence.

ID.—APPEAL—ERROR IN INSTRUCTION MUST BE SHOWN BY EVIDENCE.—It is incumbent upon the party appealing to show, not only abstract error, but error prejudicial to him upon the facts in evidence, and to avail himself of the point that an instruction was erroneous, he must bring before the court sufficient evidence to show that, upon a proper instruction, there might have been a finding in his favor.

ID.—LAST CLEAR CHANCE.—In such an action, an instruction purporting to state the law on the subject of the care to be exercised by the plaintiff to avoid injury, which is silent as to the law of the "last clear chance" doctrine, is not erroneous, if the instructions taken as a whole fully charged the jury as to that doctrine.

ID.—INSTRUCTION ASSUMING FACTS — EVIDENCE SUSTAINING ASSUMPTIONS.—It was not error to charge the jury that "If you find from the evidence that the motorman in charge of defendant's car, when about a block away from the point of the accident, saw the plaintiff riding upon his bicycle between the inner rails of the defendant's east-and-west tracks, and far enough away from the track on which

he was propelling his car so that his said car could have passed the said plaintiff safely, and that he gave warning of his approach, and that the front of his car did pass the plaintiff, and that the plaintiff then, either through excitement or otherwise, lost his balance, veered in towards the car, and that the hind step of said car struck plaintiff, and that the said car was traveling upon a straight track at the time of the accident, then I charge you that your verdict must be for the defendant," when there was evidence which, if believed by the jury, sustained each element of the hypothesis stated in the instruction.

ID.—PRESUMPTION OF CARE IN STARTING TO RIDE ON TRACKS.—Where all the evidence showed that the plaintiff had been riding along or upon the track for a block and a half before he was struck by the defendant's car, it is immaterial whether he had exercised due care at the time he started to ride along the street; and an instruction that the law presumes, in the absence of evidence to the contrary, that he looked and listened to ascertain whether a car was approaching from the rear, before getting upon the track, is properly refused as being inapplicable to the facts.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. .
N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

J. H. Ardis, and Kendrick & Knott, for Appellant.

Bicknell, Gibson, Trask, Dunn & Crutcher, and Norman S. Sterry, for Respondent.

SLOSS, J.—This action was brought by the plaintiff to recover damages for personal injuries sustained by him. Plaintiff was riding on a bicycle along a street in the city of Los Angeles, when he was overtaken and struck by an electric car operated by the defendant. The verdict was in favor of the defendant, and plaintiff appeals from the judgment upon this verdict and from an order denying his motion for a new trial.

The only points made by appellant are that the court erred in giving two instructions to the jury, and in refusing to give a third one upon the request of the plaintiff.

1. Complaint is made of the following instruction given by the court: "The tracks of a street-railway company are in themselves a sign of danger, and one riding along or

between the tracks of a street-railway company must exercise his faculties of sight and hearing to watch and listen for cars going in either direction; *and if by exercising his sight and hearing, he could see or hear the car approaching either in front or behind him and he fails to see or hear such car and is injured thereby, and his failure to see or to hear the car contributes in the slightest degree or in any manner whatever directly or proximately to the collision between himself and the car, then I charge you that he cannot recover for any injuries he may sustain by such a collision.*" No particular criticism is directed against the first part of the instruction. The contention is that the italicized portion is erroneous, in that it requires one riding along or between the tracks of a street-railroad company to exercise more than reasonable care to avoid injury, and debars him from recovery if it was at all possible for him, under any circumstances, to have seen or heard an approaching car. In other words, the instruction in effect requires one upon the track to maintain a constant watch in every direction, and declares that if, by maintaining such watch, and at the same time using his faculty of hearing, he could have seen or heard an approaching car in time to avoid a collision, his failure to see or hear it is, as a matter of law, negligence. As a statement of an abstract legal proposition we think this instruction laid down too stringent a rule, as applied to the conduct of persons proceeding along a street-railroad track. Generally, whether a party has been negligent is a question of fact depending upon a consideration of all the circumstances surrounding the case. And this, like other questions of fact, is to be determined by the jury under proper instructions from the court. "The rule is, that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions can be rationally drawn from the evidence." (*Herbert v. Southern Pacific Co.*, 121 Cal. 227, [53 Pac. 651].) There are, however, certain classes of cases which have occurred so frequently that a definite standard of care required in particular circumstances has been laid down by the courts, and in each of such classes there has been developed a rule declaring that a failure to comply with such standard is, as a matter of law, negligence. Thus it is well settled that the "railroad track of a steam railway must itself be regarded as a sign of danger,

and one intending to cross must avail himself of every opportunity to look and to listen for approaching trains." (*Herbert v. Southern Pacific Co.*, 121 Cal. 227, [53 Pac. 651].) "His failure to so act is negligence which, notwithstanding the negligence of the defendant, the law regards as such a contributory cause on his part as will make the injury his own misfortune, and relieve the other party from liability therefor." (*Glascock v. Central Pacific R. R. Co.*, 73 Cal. 137, [14 Pac. 518].) It follows that, while as an ordinary rule the question of whether a party has or has not exercised due care should be left to the jury, yet, where the standard of conduct required of persons under given circumstances is so obvious as to be applicable to all persons under such circumstances, the court may properly instruct the jury that a failure to conform to that standard is in itself negligence. Undoubtedly the rule requiring a person about to step upon the track of a steam railroad to use his faculties in order to ascertain whether a train is approaching, where the use of such faculties would have revealed to him the approach of the train, applies with equal force to a person who has entered upon and is proceeding along that track. A failure to employ such precautions while in this position of danger is negligence. (*Holmes v. South Pacific Coast Ry. Co.*, 97 Cal. 161, [31 Pac. 834].)

The situation as to street railroads differs so materially that the same rule should not be applied to one proceeding along the streets of a city upon or in proximity to the tracks of a street-railroad company operating thereon. From the very nature of the operation of steam railroads, it is not to be expected that a train of great weight and propelled at a high rate of speed can be readily stopped in order to avoid collision with persons who may be upon its tracks. It is essential that any one seeking to use the space occupied by the tracks should give way to trains operated thereon. But in the case of street railroads in cities, the use of the streets must to a certain extent be common to both the street-railroad company and other persons having occasion to use the streets. (*Bailey v. Market-Street Cable Ry. Co.*, 110 Cal. 320, [42 Pac. 914].) It is a matter of every-day observation that the portion of the street occupied by street-railroad tracks is continually used, and must be used, by other vehicles and by foot-

passengers. While the street-car has, from the necessities of the case, a right of way upon the street superior to that of others, its better right is not exclusive. (*Bailey v. Market-Street Cable Ry. Co.*, 110 Cal. 320, [42 Pac. 914].) No doubt one who has entered upon the portion of the street occupied by the tracks of a street-railroad company, and is proceeding along said tracks, is bound to exercise such care to protect himself from injury as is appropriate to the case, but it cannot, as a matter of law, be said that a failure to maintain a constant watch and to listen for cars approaching in either direction is in itself negligence. (*Mahoney v. San Francisco etc. Ry. Co.*, 110 Cal. 471, [42 Pac. 968].) Manifestly it is impossible for one driving a vehicle along a street to look in both directions at once, and it should ordinarily be left to the jury to determine, under the circumstances of each particular case, what amount of vigilance was requisite in order to constitute due care.

But it is urged that the contrary has been definitely decided by this court in *Everett v. Los Angeles etc. Ry. Co.*, 115 Cal. 105, [43 Pac. 207, 46 Pac. 889], and that the rule as there declared supports the instruction given in the case at bar. There, as here, a bicycle rider upon the railroad track was struck by a car going in the same direction. It was held that, there being nothing to prevent his seeing or hearing the car, if he had looked or listened for it, he was, as a matter of law, guilty of contributory negligence. After referring to the rule applicable to persons crossing the tracks of steam-railway companies, requiring them to "listen and look to ascertain whether danger is threatened," the court says: "With greater reason does the principle of this rule apply to one who is traveling laterally along the route of a railroad, and knows that engines will soon follow. It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field, and he who deliberately does so will be presumed to assume the risk of the perils he may encounter." After citing cases in support of this rule, the court goes on to say: "Nor is there any distinction, in the application of this doctrine, between an electric or cable line operated upon the public streets of a city, and that of an ordinary steam railroad operated upon the right of way of the corporation. While the deceased had

the undoubted right to a reasonable use of the public streets, notwithstanding its occupancy by defendant's tracks, he could not ignore or disregard the rights of the latter in the premises, nor neglect to take reasonable precautions for his own safety; if he chose to make use of the part of the street occupied by the tracks, it was his duty to look out for and endeavor to avoid the dangers incident to such use."

In the Everett case the court was not dealing with the correctness of an instruction purporting to declare a rule of law for the guidance of a jury. It was passing upon the question whether, on the undisputed facts shown by the evidence, it appeared so clearly that the person injured had taken no precautions whatever to insure his own safety that it could be said, as matter of law, that he had been guilty of negligence. In answering this question in the affirmative, language was used which, while it was appropriate enough to the discussion of the particular facts presented, should not be taken as declaring a rule of law applicable to the cases of all persons proceeding along the tracks of a street-railway company. This is pointed out in *Clark v. Bennett*, 123 Cal. 275, [55 Pac. 908], where McFarland, J., one of the justices participating in the decision of the Everett case, says that "that case . . . came here upon an exception to a denial of the court below of a motion for a nonsuit, and no question was presented touching the giving or refusal of instructions." (See, also, concurring opinion of Henshaw, J., in same case.) In cases of this character, we think the correct rule is that one riding or walking along the track of a street-railway company must use reasonable care in the exercise of his faculties of sight and hearing to watch and listen for cars going in either direction. A failure to hear or see the car is not, *per se*, proof of negligence in all cases. Whether such exercise of the faculties as, under all the circumstances of the case, was reasonable, would have averted the injury is a question of fact. The degree of vigilance to be exercised by the person on the track is to be determined by the jury, and not laid down as a matter of law, wherever the question of contributory negligence is proper to be submitted to the jury at all.

But in the case at bar, the fact that the instruction complained of went beyond the proper limits was not prejudicial to the appellant, for the reason that under any view of the

law, the undisputed evidence showed his conduct to be so lacking in every element of proper care for his own safety that the court would have been bound to set aside any verdict based upon a finding that he had not been guilty of contributory negligence. According to plaintiff's own testimony, he mounted his bicycle on Pasadena Avenue, and started in a southerly direction along said avenue. He was riding either upon the westerly track or between the two tracks of the defendant, when a car of the defendant came up behind him and struck him, inflicting the injuries complained of. He did not remember anything that occurred after he started to ride. The accident occurred in the daytime. A witness called by plaintiff testified—and this is not contradicted by any one—that plaintiff rode about a block and a half along the track before he was struck. There was ample room for him to ride on the street outside of the track. At the place where the accident occurred the track was straight. As has been stated, plaintiff was riding a bicycle, which, as he himself said, is "a very easy thing to turn from one point to another." All the evidence in the case, the plaintiff's as well as that introduced by the defendant, shows that the plaintiff was not aware of the approaching car till it was practically upon him. His health and hearing were good. Under these circumstances it is perfectly plain that his failure to see or hear the car must have been the result of absolute inattention to his situation and surroundings, and that he exercised no care whatever. To this phase of the case the decision in *Everett v. Los Angeles Ry. Co.*, 115 Cal. 105, [43 Pac. 207, 46 Pac. 889], is applicable, and it is as true here as it was there, that as matter of law the appellant was guilty of contributory negligence. (See, also, *Robards v. Indianapolis Street Ry. Co.*, 32 Ind. App. 297, [66 N. E. 66, 67 N. E. 953]; *Morrissey v. Bridgeport Traction Co.*, 68 Conn. 215, [35 Atl. 1126]; *Beerman v. Union R. Co.*, 24 R. I. 275, [52 Atl. 190]; *McClellan v. Chippewa V. E. Ry. Co.* 110 Wis. 326, [85 N. E. 1018].) On the evidence the court would have been justified in instructing the jury that appellant was guilty of negligence contributing directly to the injury. He was therefore not harmed by the action of the court in submitting this question to the jury on erroneous instructions, since there was no evidence which would

have sustained a finding in his favor under the view of the law most advantageous to him. Under these circumstances, error in the instructions furnishes no ground for reversal. (*Green v. Ophir etc. Co.*, 45 Cal. 522; *In re Briswalter*, 72 Cal. 109, [13 Pac. 164]; *Hughes v. Wheeler*, 76 Cal. 230; *Edwards v. Wagner*, 121 Cal. 376, [53 Pac. 821].) It is no answer to this position to say that the record does not show all the evidence given at the trial, but only so much as is necessary to present the errors assigned. It is incumbent upon the party appealing to show, not only abstract error, but error prejudicial to him upon the facts in evidence, and to avail himself of the point that an instruction was erroneous, he must bring before the court sufficient evidence to show that, upon a proper instruction, there might have been a finding in his favor. If he does less than this he presents for consideration a mere question of abstract error.

It is further urged that the instruction quoted is erroneous for the reason that it deprives plaintiff of the right to recover, even though the defendant may have failed to avail itself of an opportunity to avoid the injury after having discovered the dangers of the position in which the plaintiff was. But the instructions given by the court are to be taken as a whole. The jury was fully instructed as to the law of the "last clear chance" doctrine, and the charge, read in its entirety, could not have failed to convey a full understanding of the rights of the plaintiff in this regard, if indeed the facts of the case were such as to make this doctrine applicable. (*Everett v. Los Angeles Ry. Co.*, 115 Cal. 105, [43 Pac. 207, 46 Pac. 889].)

2. The appellant also claims that the court erred in giving the following charge: "If you find from the evidence that the motorman in charge of defendant's car, when about a block away from the point of the accident, saw the plaintiff riding upon his bicycle between the inner rails of the defendant's east-and-west tracks, and far enough away from the track on which he was propelling his car so that his said car could have passed the said plaintiff safely and that he gave warning of his approach and that the front of his car did pass the plaintiff and that the plaintiff then, either through excitement or otherwise, lost his balance, veered in towards the car and that the hind step of said car struck plaintiff

and that the said car was traveling upon a straight track at the time of the accident, then I charge you gentlemen, that your verdict must be for the defendant." There was evidence in the record which, if believed by the jury, sustained each element of the hypothesis stated in this instruction, and, if the facts were found by the jury to be as stated, it is perfectly clear that the injury sustained was not the result of any fault of the defendant. While it is generally the better practice to merely instruct the jury as to the governing rules of law, rather than to attempt to apply these rules concretely to the various complicated states of facts that may be contended for by the respective parties, there was no error in the instruction given, and the appellant cannot have been prejudiced by it.

3. The third point relied on by the appellant is that the court erred in refusing to give the following instruction requested by him: "The court instructs the jury that if there is no evidence to the contrary, the law presumes that the plaintiff looked and listened to ascertain whether a car was approaching him from the rear, before getting upon the defendant's street-car track, if they believe from the evidence that he did get upon said track." It is not necessary to decide in this case whether there is or is not any such presumption of law. The instruction in question was properly refused because it had no application to the facts of the case here presented. All of the evidence shows that the plaintiff had been riding along or upon the track (in whichever position he was) for a block and a half before he was struck by the defendant's car. The only material question is whether he was guilty of negligence at the time of the injury. Whether he had exercised due care at the time he started to ride along the street, a block and a half back of the point of collision, is of no consequence in determining whether he was exercising due care at the time the car struck him.

The judgment and order appealed from are affirmed.

Shaw, J., Angellotti, J., McFarland, J., Henshaw, J., and Lorigan, J., concurred.

[L. A. No. 1575. In Bank.—April 2, 1907.]

A. S. KOYER, Appellant, v. J. C. WILLMON, Respondent.

PARTNERSHIP—REAL ESTATE—PAROL AGREEMENT.—A partnership for the purpose of buying, holding, and selling lands may be formed by an agreement resting in parol, and such parol agreement is valid.

ID.—PURCHASE BY PARTNER IN INDIVIDUAL NAME—CONSTRUCTIVE TRUST—TENDER OF PURCHASE PRICE—COSTS.—Where a partnership is entered into for the purpose of buying a particular lot of land, each of the partners occupies the position of a trustee to the other with regard to all the partnership transactions, including the transactions contemplated by the firm and constituting the object or purpose for which the partnership was formed; and if one of the partners, after securing an option on the lot while acting for the firm, subsequently purchases it in his own name and with his individual money, he becomes a constructive trustee for his copartner to the extent of the latter's interest in the partnership. In such a case, the beneficiary of the constructive trust may tender to and offer to pay into court for the trustee whatever may be found just and equitable, and demand a reconveyance from the trustee, to be delivered on payment of the money. The fact of a previous tender of payment is usually important only to the determination of the question as to which of them shall recover costs.

ID.—EXCUSE OF TENDER.—A statement by the beneficiary to the trustee that he wanted the property so bought by the latter and that he was ready to pay for it, and the reply of the latter that he was going to keep it for himself, rendered unnecessary a formal tender by the beneficiary of his portion of the purchase price as a condition precedent to his right to maintain an action to enforce his rights.

ID.—PARTNERSHIP CONCERNING PARTICULAR LANDS.—One who is a general partner in the real estate business may enter into a particular partnership with a third person relating to a particular piece of land.

APPEAL from a judgment of the Superior Court of Los Angeles County. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Jones & Weller, and J. S. Chapman, for Appellant.

O. B. Carter, for Respondent.

SHAW, J.—Plaintiff began this action to obtain a decree declaring that the defendant holds title to an undivided one half of a certain lot 14 in block 93, fully described in the

complaint, in trust for the plaintiff, for an accounting of the money advanced by the defendant in the purchase thereof, and to compel the defendant, upon payment to him by the plaintiff of the amount advanced on behalf of the plaintiff by him, to convey to plaintiff said one-half interest. The court below granted a nonsuit at the close of the plaintiff's evidence and rendered judgment thereon in favor of the defendant. The plaintiff appeals. The evidence is contained in a bill of exceptions.

The complaint alleges that the plaintiff and defendant entered into an agreement to purchase certain real property situated in San Pedro, in Los Angeles County, including the said lot 14, and that it was agreed between them that all of said property should be purchased on joint account and title thereto taken by one Lydia B. Shields, who should hold the same for the joint benefit of the plaintiff and defendant; that each should pay one half of the purchase price therefor and each should be the owner of an undivided one-half interest therein; that the lands consisted of two parcels, both of which it was agreed were necessary for the purpose for which the lands were to be purchased, one parcel being the said lot 14, and the other the remaining lands. It is further alleged that in pursuance of the agreement, the plaintiff and defendant purchased the second parcel and each paid one half of the price thereof; that the defendant went to San Pedro to buy the lot 14, in pursuance of the agreement; that he did purchase it and paid the price therefor, but that instead of taking the title in the name of Lydia B. Shields for their joint use, as agreed, the defendant caused the title to be conveyed to himself alone and thereupon claimed the same as his own property, and has ever since claimed the whole of said lot as his own and asserted that the plaintiff has no interest therein, or in any part thereof. It is also averred that the plaintiff has at all times been ready, able, and willing to repay to the defendant the one half of the money expended by the defendant in buying said lot; that he tendered the same to the defendant before suit, and that plaintiff offers to deposit the same in court, upon the conveyance to him of an undivided one half of the lot.

The effect of the agreement alleged was to make the plaintiff and defendant partners in the enterprise of buying and

holding the property which was the subject of the agreement. It is not alleged that the agreement was in writing, and the evidence shows that it was made by parol and not in writing. It is settled by the decisions in this state that a partnership for the purpose of buying, holding, and selling lands may be formed by an agreement resting in parol only, and that such parol agreement is valid. (*Bates v. Babcock*, 95 Cal. 479, 484, [29 Am. St. Rep. 133, 30 Pac. 605]; *Coward v. Clanton*, 79 Cal. 26, [21 Pac. 359]. See, also, *Holmes v. McCray*, 51 Ind. 358, [19 Am. Rep. 735]; *Snyder v. Wolford*, 33 Minn. 175, [53 Am. Rep. 22, 22 N. W. 254].)

The existence of the partnership between them placed them in confidential relations toward each other, with respect to the property which was the subject of the agreement. Each occupied the position of a trustee to the other with regard to all the partnership transactions, including the transactions contemplated by the firm and constituting the object or purpose for which the partnership was formed. When Willmon undertook to accomplish for the firm the purchase of lot 14, he was acting as agent and trustee of the plaintiff, and, in contemplation of law, the plaintiff was the beneficiary of that trust, with relation to his portion of the property. "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary." (Civ. Code, sec. 2228.) He cannot "use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." (Civ. Code, sec. 2229.) When Willmon succeeded in procuring the option to purchase lot 14, he was acting for the firm, and the right to purchase the property became trust property in his hands, or under his control. Under the principles above stated, he could not thereupon appropriate the trust property to his own use, nor deal with it otherwise than for the benefit of the partnership. The trust arising upon this transaction was not technically a resulting trust, and the decisions to the effect that a resulting trust does not arise unless the beneficiary has paid the price, or some other valuable consideration on the faith of the transaction, do not apply to the case. The trust imposed upon the defendant here is of the class known as constructive trusts. It may be created in property, although the person sought to be charged as trustee bought

and paid for it with his own means, as where a guardian buys directly from his ward, or an administrator purchases from an heir the property of the estate. In such cases the beneficiary of the constructive trust may tender to the defendant and offer to pay into court for the trustee whatever may be found just and equitable, and demand a reconveyance from the trustee, to be delivered on payment of the money. The fact of a previous tender or payment is usually important only to the determination of the question whether the plaintiff or the defendant shall recover costs. (*Gray v. Dougherty*, 25 Cal. 282.) At the time Willmon obtained this lot, the other property had been purchased and paid for by the firm, and the plaintiff had assisted in obtaining information about the ownership of the lot in question and had paid the railroad fare for the trip of Willmon to find the person holding the option and had otherwise contributed to that part of the proposed purchase. The relations were such that Willmon could not take the property without allowing the plaintiff to share therein according to the partnership agreement. It was gained by the violation of a trust. (Civ. Code, sec. 2224; *Rose v. Hayden*, 35 Kan. 106, [57 Am. Rep. 145, 10 Pac. 556]; *Case v. Carroll*, 35 N. Y. 388; *Manning v. Hayden*, 5 Saw. 360, [16 Fed. Cas. 653, No. 9043].)

Under the rules governing the consideration of evidence on a motion for nonsuit, the evidence was sufficient to sustain the plaintiff's case. The testimony of the plaintiff was to the effect that the parties decided to buy the whole of the property because of its frontage on the bay of San Pedro and its supposed advantages for wharfage purposes, and that lot 14 was necessary, as it enabled them "to control the situation there"; that they thereupon agreed to buy all the property for their joint use and that each should pay one half the price; that they bought and paid for the other lots and had the title taken as agreed, in the name of Lydia B. Shields; that there was some difficulty in finding the name of the owner of lot 14, but plaintiff ascertained it, and that Willmon thereupon wrote to her at plaintiff's suggestion, and obtained an answer from her saying that she had given an option on it to some one in San Pedro, but not disclosing his name; that thereupon Willmon, at plaintiff's request, and at plaintiff's expense for railroad fare, made two trips to

San Pedro for the purpose of finding the person holding the option; that upon the second trip he succeeded in finding the man, bought the property, paid for it with his own funds, took title thereto in his own name, and that he thereupon reported the fact to plaintiff and declared that it was his own property and that the plaintiff had no interest in that part of the transaction. Plaintiff thereupon "made it plain to Mr. Willmon that (he) wanted the property and that (he) was ready to pay for it," but Willmon told him he need not say anything more about it, that he was going to keep the property, and walked out of the office where the conversation took place.

The conduct of the defendant above recited made it unnecessary for the plaintiff to go further and make a formal tender of one half of the purchase money in furtherance of his claim as a condition precedent to the right to maintain an action to enforce his rights.

It is claimed that the decision of the court below was justified by the testimony of the plaintiff on cross-examination. At the close of the cross-examination, as it appears in the record, the plaintiff testified as follows: "The defendant and I were not partners during any of these transactions, but during all of said time Mr. Sherwood was and still is my partner in the real estate business." It is evident that the plaintiff was here speaking of a general partnership and not of the special agreement with regard to the property in controversy, and that this testimony was not contradictory of, or inconsistent with, his previous testimony as to the facts concerning the agreement between himself and Willmon. The fact that he had a general partner, with whom he was engaged in the real estate business, did not prevent him from entering into a particular partnership with Willmon relating to a particular lot, or lots, of land, to buy and sell the same for their joint benefit, or to engage in any other joint enterprise concerning such lands.

The motion for a nonsuit should have been denied.

The judgment is reversed and the cause remanded to the court below for further proceedings.

Angellotti, J., Lorigan, J., Sloss, J., and Henshaw, J., concurred.

[L. A. No. 1789. In Bank.—April 2, 1907.]

MRS. PAUL MILTIMORE, Respondent, v. NOFZIGER BROTHERS LUMBER COMPANY et al., Appellants.

MECHANICS' LIENS—PRIORITY BETWEEN LIENORS—CONSTITUTIONAL LAW

—LABORERS NOT ENTITLED TO PRIORITY OVER MATERIALMEN.—Section 1194 of the Code of Civil Procedure, providing for a priority of liens against property: First, to all persons performing manual labor in, on, or about the same; second, to persons furnishing materials; third, to subcontractors; and fourth, to original contractors, does not violate section 15 of article XX of the constitution, providing that "Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the legislature shall provide by law for the speedy and efficient enforcement of such liens," in so far as it prefers the laborers and materialmen to contractors and subcontractors. That section is unconstitutional in so far as it attempts to give a priority to persons performing manual labor over persons furnishing materials.

ID.—CONSTITUTIONAL PROVISION CONFERRING LIEN SELF-EXECUTING.—

Section 15 of article XX of the constitution is self-executing to the extent that it confers upon the classes of persons enumerated therein a lien, and makes them equal, in point of rank, with regard to each other.

APPEAL from a judgment of the Superior Court of Los Angeles County. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

G. D. De Garmo, Scarborough & Bowen, E. G. Kuster, and Charles L. Batcheller, for Appellants.

M. W. Conkling, and Frank James, *Amicus Curiae*, for Respondent.

THE COURT.—The plaintiff was the owner of a lot upon which she had caused a building to be erected. When it was completed there remained unpaid a portion of the contract price which she had agreed to pay for the erection of the building. The other parties to the several appeals here under consideration, except the original contractor, are persons

claiming liens on the property for labor done or materials furnished in the building. The unpaid balance was not sufficient to pay all the liens, and the owner being unable to determine with certainty the amount or priority of the respective liens, and there being some dispute among the lien claimants concerning their respective claims and rights of priority, she began the main action, bringing the money unpaid into court, summoning all parties claiming an interest therein to appear and interplead as to their respective rights to the fund, and asking to be relieved from further responsibility in the matter.

Some of the parties began independent actions to foreclose their liens and some appeared in the main action and filed cross-complaints therein for such foreclosure. The actions were, however, all consolidated in the lower court and tried together. Judgment was given in favor of the owner as prayed for in her complaint. The rights of the several lien claimants to the fund were declared by the judgment in accordance with their rank as provided by section 1194 of the Code of Civil Procedure, the laborers being given the first right, the materialmen the second right, the residue, if any, being given to the subcontractors. There were among the several claimants representatives of each of these classes.

The subcontractors contend that all the claimants are entitled to share alike in the fund, without preference of one over the other, this claim being founded on the proposition that section 1194 aforesaid, so far as it declares that one class of lienholders shall have priority over another, is unconstitutional. The materialmen contend that, at all events, it is invalid so far as it gives the laborers preference to the persons who furnish materials for the building. It is stipulated that these comprise the only questions to be determined upon the respective appeals, there being separate appeals on behalf of the materialmen and subcontractors, respectively.

Section 1194, so far as material, is as follows:—

“In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien, or class of liens, which shall be in the following order, viz.:

“1. All persons performing manual labor in, on, or about the same.

"2. Persons furnishing materials.

"3. Subcontractors.

"4. Original contractors.

"And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank."

Section 15 of article XX of the constitution reads thus:—

"Mechanics, materialmen, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the legislature shall provide by law for the speedy and efficient enforcement of such liens."

The court is of the opinion that the constitutional provision designating the persons entitled to liens as "mechanics, materialmen, artisans, and laborers of every class," was intended to secure liens to these classes of persons for claims accruing to them for work done or materials furnished by them personally, and that it does not give a lien to contractors or subcontractors, as such. If a contractor or subcontractor personally labors in the erection of a building or improvement, or furnishes materials used therein, it may be that he would have a lien, under the constitution, for the value of such labor or material, but it would not be given by virtue of his contract, or to the amount of the contract price. His right to a lien under the contract is given solely by the statutory provisions in his behalf. The constitution does not provide for him as contractor or subcontractor. It follows that section 1194, in so far as it prefers the laborers and materialmen to contractors and subcontractors, and in so far as it prefers subcontractors to contractors, does not violate the constitution.

The effect of the constitutional provision, above quoted, is to place mechanics, materialmen, artisans, and laborers in the same class. They are each to have a lien, the mechanic, laborer, and artisan, for the value of his personal work or services bestowed, and the materialman for the value of materials furnished by him, and no preference is given to the one over the other. Their equality is thus established by the constitution, and it cannot be impaired or destroyed by the legislature. The constitution is self-executing to the extent that it confers upon these classes of persons a lien, and makes them equal in point of rank with regard to each other. The

provision of the code that persons performing manual labor shall be first paid out of the proceeds of the property, and, in effect, that the materialman shall have no lien, except upon such balance of the proceeds as may remain after the laborers are fully paid, clearly impairs, and in many cases will destroy, the right of materialmen given by the constitution. To that extent the statute is void. The court below should have directed that the laborers and materialmen should share alike in the proceeds of the property in proportion to the amount of their respective liens.

The judgment is reversed.

SHAW, J., SLOSS, J., and ANGELLOTTI, J., dissenting.
—We dissent from the opinion of the court filed on April 2, 1907. We think, under the constitution, the legislature has power to provide a different order of priority with respect to laborers and materialmen, as well as with respect to contractors, subcontractors, and other classes of lien claimants.

[L. A. No. 1610. In Bank.—April 2, 1907.]

PEOPLE'S HOME SAVINGS BANK (a Corporation), Appellant, v. M. H. SHERMAN, Respondent.

PRACTICE—DISMISSAL OF ACTION—WANT OF DILIGENCE IN PROSECUTION.

—The superior court, in ruling upon a motion to dismiss an action for want of diligence in prosecuting the same, may properly consider any facts appearing in the record of the case and bearing upon the question of diligence and good faith, whether the same occurred before the action was begun or afterward, and in reviewing the action of the superior court, and considering whether or not its discretion was properly exercised, the appellate court should also take such circumstances into consideration.

ID.—FACTS SHOWING WANT OF DILIGENCE.—An action by a banking corporation which is in process of liquidation, to recover an unpaid subscription from a former stockholder, who had transferred his stock without consideration, is properly dismissed for want of prosecution, when it appears that the corporation continued to do business for more than three years after its officers knew of its insolvency without questioning the validity of the transfer; that after a call had been made it delayed until the last day possible to bring the action in order to avoid the bar of the statute of limitations, and

then brought the action in the wrong county, and that it waited for three years before pressing for hearing a motion to transfer to the proper county, and more than a year after issue joined before taking any steps to bring the cause to trial, during all of which time constant and repeated efforts were being made to settle and adjust the case.

APPEAL from a judgment of the Superior Court of Los Angeles County. D. K. Trask, Judge.

The facts are stated in the opinion of the court.

Stratton & Kaufman, and F. G. Finlayson, for Appellant.

John D. Pope, for Respondent.

SHAW, J.—On April 24, 1906, this cause and a number of others which had been decided by the district court of appeal were transferred to this court for decision. The order was a general one, applying to all the cases, and was made in consequence of the fact that the destruction of the records of this court in San Francisco by the fire of April 18th of that year made it impossible for the court to examine any of the cases within the time limited for making such order.

In the district court an opinion was rendered, in part as follows:—

“Appeal from a judgment dismissing the plaintiff's action for want of diligent prosecution. On December 10, 1902, the defendant joined issue in the cause by filing his answer. The motion to dismiss was made December 22, 1903, one year and twelve days after issue joined. It is made to appear from the record that defendant became a stockholder in plaintiff corporation on the twenty-ninth day of May, 1890, by subscribing for three hundred shares of the capital stock of the par value of one hundred dollars, of which subscription price he paid one third, agreeing to pay the remaining two thirds upon call. It further appears that on September 30, 1891, the corporation became insolvent, a fact well known to its directors and to defendant; but notwithstanding this insolvency, the bank continued to do business until the ninth day of January, 1895, at which date it went into liquidation in accordance with the Bank Commissioners' Act; that on the thirtieth day of September, 1891, when the bank was so insolvent, defendant transferred his shares of stock to one

B. N. Pratt, without consideration, and Pratt thereafter held the stock in trust for defendant; that on September 30, 1895, plaintiff through its board of directors made a call upon the stockholders for the unpaid subscription, and that neither defendant nor Pratt paid the twenty thousand dollars unpaid upon the stock so standing in the name of Pratt. It further appears that on the twenty-ninth day of September, 1897, the complaint in this proceeding was filed against defendant in the city and county of San Francisco. It does not appear from the record that any summons was ever issued or served; but on the seventh day of February, 1899, defendant entered an appearance to said proceeding by general demurrer, and moved for a change of place of trial; that no proceedings were had upon said demurrer or said motion until the seventeenth day of June, 1902, on which date an order was made transferring the cause to Los Angeles County, the proper county for trial; that thereafter, on October 3, 1902, the demurrer was overruled, and on December 10, 1902, issue was joined. That during the whole time from the commencement of the action up until September, 1903, persistent effort was being made by plaintiff, through its attorneys and officers, to effect a settlement and adjustment of their alleged claim, on which last-named date the terms of settlement were practically agreed upon by the parties, but never finally consummated, and on December 22, 1903, defendant gave notice of his intention to move for an order dismissing the action for failure of plaintiff to prosecute the same with reasonable diligence. This motion was heard on the second day of February, 1904, and granted.

"The question presented upon this appeal is whether the court abused its discretion in granting such order. Were the length of time between the negotiations for settlement and the granting of the motion alone to be considered, we should have no hesitancy in saying that the short lapse of time would not have justified the action of the court. In all of the cases cited, and of which we have made examination, notably *Simmons v. Keller*, 50 Cal. 38, and *Kornahrens v. His Creditors*, 64 Cal. 492, [3 Pac. 126], a much greater time elapsed between the joining of issue and the order of dismissal; and in *Kornahrens v. His Creditors*, 64 Cal. 492, [3 Pac. 126], while only nine months had elapsed, there were circumstances

taken into consideration in connection therewith which justified the court in its action.

"An examination of the entire record impresses us with the conviction that the court did not abuse its discretion in dismissing this proceeding under the circumstances of this case. The fact that a banking corporation continued to do business for more than three years after its officers knew of its insolvency without questioning the validity of the transfer of stock to a third party, that after a call had been made it should delay until the last day possible to bring the action in order to avoid the bar of the statute and then to bring such action in the wrong county, thereafter to wait three years before pressing for hearing the motion to transfer to the proper county, and more than a year after issue joined before taking any steps to bring the cause to trial, during all of which time constant and repeated efforts were being made to settle and adjust the case, may well have indicated to the trial court that the action was not brought in good faith, nor maintained with a view to having the court pass upon the rights of the parties, but that the process of the court was being used for the purpose of inducing or compelling a compromise and adjustment of a disputed liability. That this court would be warranted in reversing the judgment of the court in this case, a gross abuse of discretion should be made to appear, which, in our opinion, is not disclosed in this record.

"ALLEN, J."

Upon a reconsideration of the case we are satisfied with the foregoing, and adopt it as a part of the opinion of this court.

In response to the chief objection made in the petition for transfer to this court, we add the statement that the superior court in ruling upon the motion to dismiss the action for want of diligence in prosecuting the same, could properly consider any facts appearing in the record of the case and bearing upon the question of diligence and good faith, whether the same occurred before the action was begun or afterwards, and that in reviewing the action of the superior court, and considering whether or not its discretion was properly exercised, the appellate court should also take such circumstances into consideration.

The judgment is affirmed.

McFarland, J., Henshaw, J., Sloss, J., Angellotti, J., and Lorigan, J., concurred.

[L. A. Nos. 1741, 1762. Department One.—April 3, 1907.]

HENRY MILLER, Respondent, v. COUNTY OF KERN,
Appellant.

TAXATION — PAYMENT UNDER PROTEST — INTEREST RECOVERABLE ONLY AFTER JUDGMENT.—In an action to recover taxes paid under protest, under section 3819 of the Political Code, interest after payment and before trial is not allowable, and can only be allowed against the county and state from the time of the adjudication declaring the money due.

ID. — AFFIDAVITS AUTHENTICATING ASSESSMENT-BOOK — FAILURE TO MAKE IN TIME LIMITED—DEFECT SUBSEQUENTLY CURED.—A defect in an assessment, caused by the omission of the clerk of the board of supervisors and of the county auditor respectively to affix to the corrected assessment-book their affidavits, as required by sections 3682 and 3732 of the Political Code, within the time therein limited, is cured under section 3885 of that code as to a party assessed who pays his taxes under protest, by the making and affixing of such affidavits to the assessment-book prior to the payment of the taxes. The making and affixing of such affidavits are "acts relating to the assessment or collection of taxes," within the meaning of that section, which are not rendered illegal because the same were not completed within the time required by law.

ID.—NOTICE BY TAX-COLLECTOR.—The fact that the tax-collector had given the notice to the taxpayers, as required by section 3746 of the Political Code, before the affidavits were attached, and gave no further notice after they were attached, did not affect the validity of the tax. The entire failure to give such notice would not make the tax invalid.

APPEALS from a judgment of the Superior Court of Kern County and from an order refusing a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, J. W. P. Laird, and Rowen Irwin, for Appellant.

Isaac Frohman, and Frohman & Jacobs, for Respondent.

SHAW, J.—This case is docketed under the above numbers, No. 1741 being an appeal from the judgment, and No. 1762 an appeal from an order denying defendant's motion for a new trial. We have concluded that the judgment must be reversed, with directions to enter a modified judgment on the findings.

The action is brought under section 3819 of the Political Code, to recover taxes claimed to be illegal and paid under protest. The case was before this court upon a former appeal by the plaintiff from a judgment given in favor of the defendant, upon a demurrer to the complaint. Upon that appeal the judgment was reversed. (*Miller v. County of Kern*, 137 Cal. 516, [70 Pac. 549].) Many questions arising in the case were decided against the plaintiff on that appeal, and are not now argued. After the case again reached the lower court an answer was filed denying the facts upon which the reversal was based. Upon the trial, an agreed statement of facts was filed from which the court made findings and gave judgment in favor of plaintiff as prayed for.

1. Upon the former appeal it was decided that growing alfalfa is not subject to taxation, and hence that the item of \$1,110, paid by plaintiff as taxes levied on certain growing alfalfa, assessed at sixty thousand dollars, was invalid. The court below, upon the subsequent trial, declared the entire tax invalid and gave judgment for the taxes paid, with interest thereon from the date of payment to the time of trial. The appellant concedes the invalidity of the tax as to the sum of \$1,110, levied upon growing alfalfa, but insists that no interest should have been allowed thereon until after judgment. In this the appellant is correct. In *Savings and L. Soc. v. San Francisco*, 131 Cal. 356, [63 Pac. 1013], and *Columbia Sav. Bank v. Los Angeles*, 137 Cal. 471, [70 Pac. 308], it was in substance held that in an action to recover taxes paid under protest, under section 3819 of the Political Code, interest after payment and before trial was not allowable, and that interest could only be allowed against the county and state from the time of the adjudication declaring the money due. The judgment now appealed from was rendered on November 22, 1904. It was correct to the extent of \$1,110 and no more. Upon the going down of the *remittitur* the plaintiff will be entitled to judgment for that sum

with legal interest from the date above given. (*Columbia Sav. Bank v. Los Angeles*, 130 Cal. 471, [70 Pac. 308].)

2. The only points upon which it is now claimed that the balance of the tax paid was invalid are,—1. That although the clerk of the board of supervisors delivered the corrected assessment-book for the year 1895 to the county auditor on the first Monday of August, 1895, the time required by section 3682 of the Political Code, he did not affix to it, nor accompany it with, an affidavit, as required by that section; that the affidavit was made and affixed to the book on November 1, 1895, and not before; and 2. That the auditor, after computing and extending the taxes on the book, delivered it to the tax-collector on the second Monday of October, 1895, as required by section 3732 of the Political Code, and did not then, nor at all, until November 1, 1895, make or attach to the book his affidavit in authentication thereof, as required by that section, and that in the mean time the tax-collector had published the notice to taxpayers, as required by section 3746 of the Political Code.

The allegations of the complaint are that the corrected assessment-book, when it was delivered by the clerk of the board of supervisors to the auditor, and thereafter when delivered by the auditor to the tax-collector, was not accompanied by the affidavit required by section 3682, nor by any affidavit, nor was any affidavit of the auditor attached thereto, as required by section 3732, when it was delivered to the tax-collector. In the decision upon the former appeal, these allegations were admitted by the demurrer, and as it did not appear by averment, and was not presumed, that the affidavits had been attached after delivery, the case was decided upon the theory that they had never been attached, and were entirely lacking. Upon that assumption the taxes were said to be void, but the question of their validity, in case it should afterwards be shown that the proper affidavits were attached after the respective deliveries of the book, was expressly left open and undecided.

Upon the subsequent trial in the lower court, in response to the allegations of the answer, the court made findings that on November 1, 1895, after the assessment-book was delivered to the tax-collector, and after publication by him of the notice

to taxpayers, the clerk of the board of supervisors and county auditor, respectively, made and attached to the book the affidavits required of them, respectively, by sections 3682 and 3732 aforesaid. The plaintiff did not make his protest, nor pay any taxes, until November 25, 1895. At that time the affidavits were attached as required. There is no claim that the delay in attaching them, or their absence prior to November 1st, caused any injury to the plaintiff or affected him in any manner.

We are of the opinion that the defect previously existing in the assessment, by reason of the lack of these affidavits, was cured by the facts as above found by the court. The making and attaching of these affidavits to the assessment-book is required, as stated by this court upon the former appeal, for the purpose of authentication. They are "acts relating to the assessment or collection of taxes," beyond doubt.

Section 3885 of the Political Code is as follows: "No assessment or act relating to assessment or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law."

There was not an entire failure to perform the acts of making and affixing the affidavits; they were properly made and affixed, but not within the time specified in the code. No injury was caused, and we cannot see that injury could be caused, by the delay. By the express language of section 3885 the delay did not make the affidavits or the assessment in question illegal. They were lawfully made and attached, and if the assessment was previously invalid for lack of them, as had been in effect decided for the purposes of this case, it became valid and lawful the moment they became attached to the book on November 1, 1895. This is a reasonable doctrine and we perceive no benefit, public or private, to be derived from holding the contrary. It is fully supported by the decisions in similar cases: *Buswell v. Supervisors*, 116 Cal. 354, [48 Pac. 226]; *People v. Eureka etc. Co.*, 48 Cal. 146; *Hart v. Plum*, 14 Cal. 155; *Payne v. San Francisco*, 3 Cal. 126; *State v. Mining Co.*, 15 Nev. 388; *State v. Western U. T. Co.*, 4 Nev. 344; *Walker v. Edmunds*, 197 Pa. St. 647, [47 Atl. 868]; *Hooker v. Bond*, 118 Mich. 257, [76 N. W. 405]; 1 Cooley on Taxation, 3d ed., 486.

It is suggested that the fact that the tax-collector had given the notice to the taxpayers, as required by section 3746, before these affidavits were attached, made the defect incurable unless a new notice was given thereafter, which does not appear to have been done. This proposition is sufficiently answered by the decision upon the former appeal in this case, wherein it was held that an entire failure to give this notice would not make the tax invalid. (*Miller v. County of Kern*, 137 Cal. 524, [70 Pac. 549].) Conceding, therefore, that the tax could not lawfully have been collected prior to November 1st, and assuming that then, for the first time, the tax-collector received a valid assessment-book for that year, and that his previous notice to taxpayers was ineffectual, his subsequent failure to give the notice would not affect the validity of the tax, nor authorize its recovery after payment under protest.

The facts upon which the decision of this case depends, having been agreed upon by the parties, and being fully set forth in the findings, there is no necessity for another trial.

The order denying the new trial is affirmed without costs to either party. The judgment is reversed, with costs, and the cause remanded to the superior court, with directions to that court to enter judgment in favor of the plaintiff against the defendant for the amount of \$1,110, and legal interest thereon from November 22, 1904, to the date of such judgment, with costs of suit, other than the costs of the appeals.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

[L. A. No. 1742. Department One.—April 8, 1907.]

**KERN VALLEY WATER COMPANY, Respondent, v.
COUNTY OF KERN, Appellant.**

TAXATION — AUTHENTICATION OF ASSESSMENT-BOOK — DEFECT SUBSEQUENTLY REMEDIED — PAYMENT UNDER PROTEST — INTEREST.—*Miller v. County of Kern*, ante, p. 797, affirmed to the effect that a defect in an assessment, caused by the omission of the clerk of the board of supervisors and of the county auditor, respectively, to affix to the
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assessment-book their affidavits, as required by sections 3682 and 3732 of the Political Code, within the time therein limited, is cured, as to a party assessed who pays his taxes under protest, by the making and affixing of such affidavits to the assessment-book prior to the payment of the taxes; and also to the effect that interest on taxes paid under protest is not recoverable for the time between the payment and the recovery of judgment.

ID.—CANAL SITUATED IN DIFFERENT SCHOOL AND ROAD DISTRICTS—ASSESSMENT.—The assessment of a canal situated in more than one school district, and also in more than one road district, which does not show in what school districts and road districts it was thus situated, and in which the respective parts of the canal situated in the respective road districts were not separately assessed or otherwise designated, so that the tax due in each district could be ascertained therefrom, is invalid, and the tax levied thereon is void.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, J. W. P. Laird, and Rowen Irwin, for Appellant.

Isaac Frohman, and Frohman & Jacobs, for Respondent.

SHAW, J.—The defendant appeals from the judgment upon the judgment-roll. The action is brought under section 3819 of the Political Code, to recover taxes alleged to be illegal and paid under protest.

1. So far as the claim of illegality is founded upon the failure of the clerk of the board of supervisors and the county auditor, respectively, to attach an affidavit to the assessment-book, as required of them, respectively, by sections 3682 and 3732 of the Political Code prior to November 1, 1895, the decision must be against the plaintiff, upon the authority of the opinion in the case of *Miller v. County of Kern*, ante, p. 797, [90 Pac. 119], decided concurrently with the present case, wherein the question is sufficiently discussed.

2. The judgment for the plaintiff was for the sum of \$1,900.96. The items composing this sum were \$1,110, assessed upon a certain canal; \$67.52, assessed upon certain lands; and \$723.44, allowed by the court as interest on the first two items from the time of payment thereof under protest, until Novem-

ber 22, 1904, the date of the judgment. Upon the authority of *Savings and Loan Soc. v. San Francisco*, 131 Cal. 363, [63 Pac. 665]; *Columbia Sav. Bank v. Los Angeles*, 137 Cal. 471, [70 Pac. 308]; and *Miller v. County of Kern*, ante, p. 797, [90 Pac. 119], the allowance of interest thus made must be held erroneous.

3. The canal above mentioned was situated in more than one school district, and also in more than one road district. The assessment, however, did not show in what school districts and road districts it was thus situated, nor were the respective parts of the canal situated in the respective road districts separately assessed, or otherwise designated, so that the tax due in each district could be ascertained therefrom. This rendered the tax on that item of the assessment void. It was so decided in *Kern V. W. Co. v. County of Kern*, 137 Cal. 511, [70 Pac. 476], which was a former appeal in this case. The item of \$67.52 was claimed to be void for the same reasons, and the facts were so alleged in the complaint. When the cause again came up in the lower court after the reversal on the former appeal, issue was taken on these allegations by the answer, and the court in response thereto made findings that the allegations of the complaint were untrue, and that the assessment-book did show in what school districts and road districts, respectively, the lands were situated, and that they were separately assessed accordingly. We are at a loss to understand the reason for including this item in the judgment, and, as the respondent advances none, we presume it was an inadvertence. The judgment is to this extent erroneous. The facts were found by the court in accordance with an agreed statement thereof signed by the parties, and the rights are fully disclosed thereby. No further proceedings appear to be necessary. The appellant does not claim that the judgment is erroneous in any other particulars than those above given. Justice can be done by a modification of the judgment by this court.

The judgment of the superior court appealed from is modified by striking therefrom the item of \$723.44, allowed as interest, and the further sum of \$67.52, included therein for taxes paid on property of the plaintiff other than the canal. The judgment as thus modified will be for the sum of \$1,110, and will stand as a judgment of its date, November 22, 1904,

and is to bear interest from and after that date at the legal rate of seven per cent per annum, and as so modified the judgment is affirmed. The appellant will recover the costs of appeal.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

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and is to bear interest from and after that date at the legal rate of seven per cent per annum, and as so modified the judgment is affirmed. The appellant will recover the costs of appeal.

Angellotti, J., and Sloss, J., concurred.

Hearing in Bank denied.

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AGENCY (Continued).

per cent of the full amount of the premiums on insurance written by them, and these commissions on the "return premiums" are chargeable against the sureties on their bonds as well as against the principals. This contemplates a continuance of the accounts after the termination of the agency for the purpose of charging commissions on return premiums and rebates. (Id.)

4. **DEDUCTIONS FOR REINSURANCE.**—Deductions for reinsurances should only be for those effected during the existence of the agency. (Id.)
5. **ACCOUNTS WITH SUB-AGENTS.**—The agents are responsible for the payment of sub-agents, and the commissions of the sub-agent is a matter between the agents and the sub-agents, with which the company had no concern, and this item should not be taken into account at all in the accounts between the company and its agents. But where in closing up business written by the agents, the premiums for which had not been collected prior to the termination of the agency, the company did not collect the full premiums, but so much of them as remained after deducting the commissions of the sub-agents due from the agents, such commissions were properly chargeable to the agents as an item of expense required to be paid by them. (Id.)

See Contract, 1; Corporations, 1, 2.

ALIMONY. See Divorce.

AMENDMENT. See Practice, 4-7.

APPEAL.

1. **REOPENING CASE—CONFLICTING EVIDENCE.**—A motion to reopen the case, made upon conflicting affidavits, is addressed to the discretion of the trial court, and its action thereon will not be interfered with on appeal. (*Kataoka v. Hanselman*, 673.)
2. **NEWLY DISCOVERED EVIDENCE—NEW TRIAL.**—The refusal of the trial court to grant a motion for a new trial upon the ground of newly discovered evidence will not be interfered with on appeal when the evidence submitted on the motion is conflicting or the alleged new evidence was merely cumulative. (Id.)
3. **INTERLOCUTORY JUDGMENT IN PARTITION—DISMISSAL.**—Under subdivision 3 of section 939 of the Code of Civil Procedure, an appeal from an interlocutory judgment in actions for partition of real estate must be taken within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk. An appeal taken subsequent to such limitation, although within sixty days after the date of the entry in the judgment-book, will be dismissed. (*Bloom v. Gordan*, 762.)
4. **APPEAL FROM JUDGMENT—FAILURE TO FIND ON ISSUE—PRESUMPTION—EVIDENCE.**—On an appeal from a judgment on the judgment-

APPEAL (Continued).

roll alone, the judgment will be affirmed if supported by findings actually made, and the want of a finding on an issue will be presumed, in the absence of a showing to the contrary, to be the result of a failure to offer any evidence in support of such issue. (*Schoonover v. Birnbaum*, 734.)

See Bankruptcy; Bill of Exceptions, 1, 4; Costs, 1, 4; Divorce, 2-4, 7; Estates of Deceased Persons, 12-15, 17; Findings; Mortgage, 2; Negligence, 10, 29, 34; New Trial, 2-6, 15.

ASSIGNMENT. See Divorce, 10; Parties.

ATTACHMENT.

1. **LEVY UPON REAL PROPERTY DEVISED—LIEN NOT AFFECTED BY DISTRIBUTION.**—If an attachment is properly levied upon real property devised by the will of a deceased testator, the lien created thereby is unaffected by the subsequent decree of distribution thereof. The attaching creditor of the devisee was not required to present his claim to the probate court, and was not entitled to participate in the distribution of the estate; but the property distributed continued to be subject to the lien of the attachment if legally levied thereupon. (*Martinovich v. Marsicano*, 597.)
2. **SHERIFF'S DEED UNDER EXECUTION—RELATION TO ATTACHMENT LEVY.**—A sheriff's deed executed in pursuance of an execution sale under a judgment rendered in an attachment suit relates back to and takes effect from the levy of the attachment, if sufficient to create a lien. (*Id.*)
3. **PREVALENCE OF TITLE—DISTRIBUTION TO GRANTEE OF DEVISEE—DEED AFTER ATTACHMENT LEVY.**—A sheriff's deed under an execution sale to the defendant, which relates to the date of an attachment levy, in a suit against the original devisee, will prevail over the title of the plaintiff, who took distribution as grantee of the devisee, where the deed of the devisee to the plaintiff was executed after the attachment levy. (*Id.*)
4. **AFFIDAVIT AND BOND FOR ATTACHMENT—WRITS TO DIFFERENT COUNTIES AT DIFFERENT TIMES.**—Several writs of attachment to different counties, though they may be issued at the same time, are not required to be so issued; but writs to different counties may be issued at different times on the same affidavit and bond, provided they are issued within a reasonable time after the making and filing of the affidavit. (*Id.*)
5. **TIME FOR WRIT NOT PRESCRIBED—DELAY FOR "UNREASONABLE TIME."**—Our statute does not prescribe the time within which, after the making and filing of the affidavit, a writ of attachment may legally issue, nor limit the force and effect of the affidavit to any

ATTACHMENT (Continued).

specified time after its execution, if the writ be not delayed thereafter for an "unreasonable time," whereby is meant such delay as would, under the circumstances, cast suspicion on the verity of the affidavit, or lead to the supposition that the ground stated for the attachment had ceased to exist. (Id.)

ATTORNEY AND CLIENT.

1. **EVIDENCE—PRIVILEGED COMMUNICATIONS.**—Communications made by clients to their attorney concerning a material matter of controversy for which he was employed in their behalf during the existence of the relation between them are privileged and are not admissible against the clients without their consent. (Hardy v. Martin, 341.)
2. **OBJECT OF STATUTE—PROTECTION OF CLIENT—EXISTENCE OF RELATION.**—Subdivision 2 of section 1881 of the Code of Civil Procedure, respecting privileged communications between attorney and client, is intended for the protection of the client, and to encourage him to give to the attorney whom he consults the fullest information concerning the facts upon which he asks the attorney's advice or action; and if the relation existed when the communications were given, the subsequent cessation of the relation does not make the communications admissible. (Id.)
3. **ACTION TO SET ASIDE DEED—FRAUD AND UNDUE INFLUENCE—CONFLICTING EVIDENCE—ADMISSION OF LETTERS TO ATTORNEY—MATERIAL ERROR.**—In an action to set aside a deed alleged to have been procured from plaintiffs by the fraud and undue influence of an uncle, who had long stood to them in a relation of trust and confidence, and whose promises they relied upon, though he did not intend to keep them, where there was evidence tending to sustain the plaintiffs' action, and counter-evidence in support of the defense, and the judgment was against the plaintiffs, it was material error requiring a reversal of the judgment to admit letters written by plaintiffs to an attorney employed by them, while the relation of attorney and client subsisted, which contained admissions material to the defense. (Id.)
4. **IMMATERIAL CIRCUMSTANCES—CESSATION OF RELATION BEFORE DEED—ACTION OF CLIENTS—ATTORNEY AS WITNESS TO AGREEMENT.**—The circumstances that the relation of attorney and client was discontinued before the execution of the deed, and that the clients acted independently in the conveyance to their uncle out of their personal regard for him and in reliance on his promises; and that the attorney subsequently became a witness to a written agreement made contemporaneously with the deed, even if his signature was requested by them, could not tend to make their previous letters to the attorney, written while the relation of attorney and client subsisted, admis-

ATTORNEY AND CLIENT (Continued).

sible, or to waive their right to object to their introduction in evidence. (Id.)

5. ACTION—APPEARANCE BY ATTORNEY—POWER OF CONTROL.—A plaintiff in an action may either appear in his own proper person or by attorney; but he cannot do both, and if he has appeared by attorney, he has no power of control over the action otherwise than through his original or substituted attorney of record. (*Boca and Loyaltan Railroad Company v. Superior Court of Lassen County*, 153.)
6. INJUNCTION SUIT BY PLAINTIFF IN FORECLOSURE—IMPROPER DISMISSAL—JURISDICTION—PROHIBITION.—A corporation which, after suing to foreclose a deed of trust of a railroad, brought a separate suit by its attorneys to restrain one of the defendants in foreclosure from using a certain railroad-crossing, could not by filing a dismissal of the injunction suit in its own name divest the court of jurisdiction to make further orders therein; and the defendant sued cannot maintain prohibition to prevent further proceedings in the injunction suit upon the ground that it has been properly dismissed. (Id.)
7. PENDENCY OF MOTION TO DISMISS—OPPOSITION BY BENEFICIARIES—PRESUMPTION.—The mere making by the attorneys of record for the plaintiff of a motion for dismissal in open court, which is pending and undetermined, and the granting of which was opposed by beneficiaries represented by the deed of trust, could not operate as a dismissal of the suit under subdivision 1 of section 581 of the Code of Civil Procedure, nor divest the court of jurisdiction to decide the motion, which it must be presumed will be correctly determined. (Id.)

BAIL. See Criminal Law, 3.

BANK. See Evidence, 3.

BANKRUPTCY.

1. ADJUDICATION DOES NOT STAY APPEAL IN STATE COURTS.—The mere filing in the appellate court of a certified copy of an order made by the United States district court adjudging the respondent a bankrupt, which order was made subsequent to the taking of the appeal, does not deprive the appellate court of the power of deciding the appeal on the merits. (*Reynolds v. Pennsylvania Oil Company*, 629.)
2. SUBSTITUTION OF TRUSTEE AS APPELLANT.—Where a judgment debtor is adjudged a bankrupt pending his appeal from the judgment, the appellate court on the mere motion of the judgment debtor will not order his trustee in bankruptcy to be substituted in his place as the appellant. (*Oscar Bonner Oil Company v. Pennsylvania Oil Company*, 658.)

BILL OF EXCEPTIONS.

1. **FAILURE TO SERVE IN TIME—ABSENCE OF RELIEF—REVIEW UPON APPEAL.**—Upon appeal from the judgment and from an order denying a new trial, where the record shows that the bill of exceptions used on the motion for a new trial was not prepared and served in time, and shows no relief from the default, the bill of exceptions cannot be considered on either appeal. (*Johnson v. German American Insurance Company*, 336.)
2. **CONSTRUCTION OF CODE AS TO EXTENSION OF TIME—POWER OF JUDGE OF COUNTY—PROHIBITION.**—Section 1054 of the Code of Civil Procedure allowing an extension of time by the judges of the superior court of the county must be construed subject to the express prohibition of section 170 of that code, that no disqualified judge shall act. (*Id.*)
3. **VOID ORDER EXTENDING TIME—DISQUALIFICATION OF JUDGE.**—An order extending the time in which to prepare and serve the bill of exceptions to be used on the motion for a new trial, made by a judge who was disqualified to act, under section 170 of the Code of Civil Procedure, as the same existed prior to its amendment in 1905, was absolutely void, wherever brought in question, and could not operate to relieve from failure to serve the bill of exceptions within the time otherwise limited. (*Id.*)
4. **ABANDONMENT OF APPLICATION FOR RELIEF—ACQUIESCENCE IN RULING OF COURT.**—Where a bill of exceptions settled on the hearing of a motion to dismiss the proceedings for a new trial shows that appellant made a conditional motion to be relieved from its failure to serve its proposed statement in time, "if there was such failure," upon the ground of mistake, inadvertence, and excusable neglect, supported by an affidavit not contained in the record, and that the court never ruled upon such conditional motion, but denied the motion solely on the ground that there was no default, the appellant, by acquiescence in this action of the court, and omission to except to the failure to rule upon the motion for relief, and voluntarily submitting the motion for a new trial upon the record as it then existed, waived and abandoned the motion for relief under section 473 of the Code of Civil Procedure. (*Id.*)

See *New Trial*, 2, 6-9, 16.

BONDS. See *Dupont-Street Bonds*.

BOUNDARY.

EVIDENCE — FINDINGS.—Upon a review of the evidence and findings as they appear in the case, *held*, that the so-called Seebold line should have been taken, for the purposes of this case, as the line establishing the boundary between the land of the plaintiff and defendant; and that therefore the finding that the plaintiff is not the owner of any of the premises described in the complaint is not sustained by the evidence and is contrary to the other findings. (*McLean v. Baldwin*, 615.)

BROKERS. See Contract, 1.

CERTIORARI.

1. **FORECLOSURE AGAINST RAILROAD COMPANY—CROSSINGS BY ANOTHER COMPANY—INJUNCTION—EX PARTE ORDER REMOVING TRACK—DUE PROCESS OF LAW.**—In an action to foreclose a trust-deed securing bonds of one railroad company, in which another railroad company is defendant, and by answer claimed rights of way for two crossings over the track of the first company, which were in place and operation and superior to the rights of the foreclosing plaintiff, an *ex parte* order on affidavits removing entirely the track of one of the crossings, as being maintained in violation of a temporary injunction obtained by the foreclosing plaintiff in another suit to enjoin its use, without any notice or other opportunity of the company operating the crossing to be heard prior to its removal, is in violation of the constitutional guaranty that no one shall be deprived of property without due process of law, and will be annulled upon *certiorari*. (*Boca and Loyaltan Railroad Company v. Superior Court of Lassen County*, 147.)
2. **CONSTRUCTION OF CODE—VACATION OF EX PARTE ORDER UPON NOTICE—PROVISION INAPPLICABLE TO VOID ORDER.**—Section 937 of the Code of Civil Procedure, in regard to the vacation upon notice of *ex parte* orders, is applicable only to such orders as a judge has power to make without notice, and has no application to a void *ex parte* order outside of the jurisdiction of the court, the effect of which is to deprive a person of property without due process of law. (*Id.*)
3. **SUSPENSION OF INJUNCTION—RECONSTRUCTION OF TRACK—RETENTION BY COURT OF RAILS REMOVED—QUESTION NOT MOOT—ANNULMENT OF ORDER.**—Although the injunction was suspended and the railroad company reconstructed the crossing removed, yet where the court by its agent retained the rails removed, and refused to vacate the order removing the track on motion of such railroad company, the question has not become moot by reason of the reconstruction of the track, and the order removing it will be annulled upon *certiorari*. (*Id.*)
4. **ABSENCE OF OTHER ADEQUATE REMEDY.**—The order complained of directing an agent of the court to remove the track is neither an order granting an injunction nor an order appointing a receiver, and was not appealable; and the petitioner has no other plain, speedy, or adequate remedy which can preclude the remedy by *certiorari*. (*Id.*)

COMPOSITION AGREEMENT. See Corporations, 1; Debtor and Creditor.

CONSIDERATION. See Promissory Note.

CONSTITUTIONAL LAW. See Certiorari, 1; Corporations, 13; Costs, 1, 4; Criminal Law, 7; Mechanics' Liens, 1-3, 12; Municipal Corporations, 1-10; Place of Trial, 2; Taxation, 22; Title to Land, 5-16.

CONTRACT.

1. **CONTRACT TO ENGAGE IN REAL ESTATE BROKERAGE BUSINESS CONSTRUED—INDIVIDUAL SPECULATION.**—Upon a construction of the contract sued on, whereby the parties agreed to engage in a "general real estate, rental, collection, and insurance business," and to divide the profits resulting therefrom, *held*, that the contract did not contemplate anything more than the usual brokerage business conducted by real estate and insurance agents, and did not entitle plaintiffs to a share of the profits resulting from the purchase and sale of land by the defendant on its own account. (*Hipwell v. Pioneer Investment and Trust Company*, 723.)
2. **ACTION FOR SERVICES—PLEADING—QUANTUM MERUIT—IMPLIED PROMISE—EXPRESS PROMISE—SURPLUSAGE.**—A complaint stating that plaintiff performed certain services for the defendant and alleging their reasonable value, and that they were rendered at the special instance and request of the defendant, states a sufficient cause of action on *quantum meruit*. From these facts the law implies a promise to pay the reasonable value, and an averment of an express promise to that effect is surplusage which will not vitiate the pleading. (*Brown v. Crown Gold Milling Company*, 376.)
3. **VARIANCE—EVIDENCE OF CONTINGENT CONTRACT—BREACH WITHOUT CAUSE—SUPPORT OF QUANTUM MERUIT—NONSUIT.**—Although proof of a contingent contract would be a fatal variance, where a contract to pay a definite sum absolutely is alleged; yet where the cause of action is upon a *quantum meruit*, and a contingent contract has been broken, proof of such contingent contract and of its breach without cause, shows no variance justifying a nonsuit, but supports the *quantum meruit*. (*Id.*)
4. **WRONGFUL DISCHARGE OF EMPLOYEE—RESCISSION OF CONTRACT—RECOVERY OF REASONABLE VALUE OF SERVICES.**—Where an employee is discharged by his employer without cause during the term of his employment, he may regard the contract as rescinded, and sue upon a *quantum meruit*, and recover the reasonable value of his services, as if the special contract of employment had never been made. (*Id.*)
5. **IMMATERIAL INFIRMITIES IN CONTRACT—UNCERTAINTY.**—A plaintiff in *quantum meruit* does not sue upon an express contract or for a specific performance of it; and it is immaterial what infirmities exist in the contract actually made, or whether it is or is not void for uncertainty, or for any other cause. (*Id.*)
6. **EMPLOYMENT BY CORPORATION—MANAGER DE FACTO—KNOWLEDGE OF DIRECTORS—IMPLIED RATIFICATION.**—A contract of employment by a corporation may be made by one who is its manager *de facto*;

CONTRACT (Continued).

and where the terms of the contract of employment were known to the majority of its directors individually, and they did not disaffirm the contract, they are deemed in law to have ratified it. (Id.)

7. **EVIDENCE—TERMS OF EMPLOYMENT—STATEMENTS OF MANAGER.**—Statements made by the manager of the corporation during the course of the continuous employment of plaintiff by the corporation under the manager's authority with reference to the terms of the employment were admissible as tending to show those terms. (Id.)
8. **CONTINGENT EMPLOYMENT FOR LIFE—SUCCESS OF BUSINESS—DISCHARGE—EVIDENCE OF PRESENT CONDITION.**—Where, by the terms of the contract of employment, plaintiff, as an expert assistant in a business, was to have a position for life when the business was successful, with ample remuneration, and meanwhile was to have a small weekly salary for living expenses, his discharge could be justified only by proof of cause therefor, or that the business was in fact a failure; and mere evidence that it had not paid expenses and that the company had present indebtedness not paid, without any pretense of failure of the enterprise, was inadmissible. (Id.)
9. **RECEIPTS OF WEEKLY SALARY IN FULL—MEASURE OF COMPENSATION—EXPLANATION OF PURPOSE—INSTRUCTIONS.**—In view of the circumstances and terms of the contract, the court properly refused an instruction that receipts for weekly salary "in full for account" must be regarded as a deliberate admission that the rate of compensation stated therein was the rate expressly agreed upon, and properly instructed the jury "that a receipt is never conclusive; it is always open to explanation, and the purpose for which it was given may be shown." (Id.)
10. **SERVICES OUTSIDE SCOPE OF EMPLOYMENT—REASONABLE COMPENSATION—INSTRUCTION—QUESTION FOR JURY.**—An employee in a particular service has the right to a reasonable compensation for services rendered outside the scope of his employment, although there is no express agreement therefor. Where plaintiff's evidence justified an instruction to that effect, it was properly given; and the question whether services were in fact rendered by plaintiff outside the scope of his employment was one for the jury to determine. (Id.)
11. **INSTRUCTION AS TO WRONGFUL DISCHARGE—FACT NOT ASSUMED—DUTY OF DEFENDANT.**—An instruction that if the jury found that the agreement was that plaintiff should work for two dollars and fifty cents per day until the company was in a condition to pay more, or until it got in a more prosperous condition, "then the defendant had no right to discharge the plaintiff without cause," does not improperly assume that plaintiff's discharge by defendant was wrongful, or take that question from the jury. It was subject to a reasonable application by the jury to the evidence; and if defendant wanted it more clearly stated, it should have asked the court to make it so. (Id.)

CONTRACT (Continued).

12. **INSTRUCTION AS TO EFFECT OF EMPLOYER'S ACTION.**—An instruction "that where a servant has been wrongfully discharged during the term of his service, or where the term of service is otherwise closed by his employer's action, the employee may treat the contract as rescinded and sue on a *quantum meruit* for the reasonable value of the services performed" neither assumes a "wrongful discharge" nor is objectionable in the use of the words "or where the term of service is otherwise closed by his employer's action." (Id.)
13. **CONTRACT FOR PURCHASE OF SALT—ACTION FOR BREACH—RULING AS TO IMMATERIAL EVIDENCE—EXCLUSION OF CONTRACT—AMENDMENT—SECOND OFFER UNNECESSARY.**—In an action for damages for breach of a contract showing the purchase of a quantity of salt, under a scale of prices fixed according to quality, to be ordered for shipment before a time fixed, where the court ruled that the contract should be excluded from evidence, as being an executed contract which was void for incompleteness, want of materiality, and uncertainty, and allowed an amendment setting forth the specific orders made for the delivery of salt at a certain price, but declaring at the same time that no amendment of the pleading would affect its construction of the contract, no second offer of the contract was necessary after such amendment and declaration by the court. The law does not require the doing of vain things. (*Mebius & Drescher Company v. Mills*, 229.)
14. **PROOF OF EXECUTION OF CONTRACT—SIGNATURE BY PLAINTIFF CORPORATION—AUTHORITY OF PRESIDENT—ADMISSION OF PLEADINGS.**—Where the execution of the contract was sufficiently proven against the defendants sought to be charged, no proof of the authority of the president of the corporation to sign the contract for it is necessary, where no issue was raised as to his authority, which was alleged in the complaint; and an alleged demand by plaintiff corporation for a fulfillment of the contract showed a ratification of the president's signature, rendering proof of his authority unnecessary. (Id.)
15. **PARTNERSHIP OF DEFENDANTS — VARIANCE — QUESTION FOR JURY.**—If any variance existed between the complaint and the evidence as to the partnership of the defendants, without deciding that it did exist, the question as to such variance was one for the jury, and the court would not be justified on that ground in summarily withdrawing the case from the consideration of the jury by an instruction to find for the defendants. (Id.)
16. **CONSTRUCTION OF CONTRACT—ERROR OF COURT.**—Applying the proper principles for the construction of contracts, the court erred in holding the contract to be an executed contract, which was void for the reasons assigned. It does not evidence a completed sale, which would be open to the objections of uncertainty and want of mutuality; but at the most it is an executory contract of sale, and at the least

CONTRACT (Continued).

an option to purchase good until withdrawal, and binding if the option was exercised before withdrawal. (Id.)

17. **EXECUTORY CONTRACT—OBLIGATIONS AND RIGHTS OF PARTIES.**—Treating the contract as an executory contract of sale, plaintiff had bound itself to take a specified quantity of salt, and had a specified time in which to select the kinds or one kind of salt which it would use, the prices thereof being fixed, and defendants had bound themselves to supply this salt at those prices as delivery of the same should be demanded during the time fixed. If plaintiff failed to take that quantity of salt of a specified kind or kinds by the time fixed, it would be the right of the defendant salt company to have insisted upon plaintiff taking such kind and quality of salt as would be most advantageous to it. (Id.)
18. **OPTION TO PURCHASE—ACCEPTANCE.**—Treating the contract as an option to purchase, the legal effect is not different. Not having been withdrawn, it became binding upon an acceptance evidenced by the demand for the shipment of the quantity and kind of salt ordered under the terms of the contract within the time limited and the offer to pay the agreed price therefor. (Id.)
19. **CERTAINTY OF CONTRACT—CODE MAXIM.**—The maximum amount of quantity being fixed by the contract, the uncertainty as to the quantity and quality of particular kinds of salt which might be chosen is not the kind of uncertainty which renders an executory contract unenforceable. The agreement is relieved of uncertainty when the choice is exercised; and such contracts come within the maxim embodied in section 3538 of the Civil Code, that "that is certain which can be made certain." (Id.)
20. **CONSTRUCTION UPHOLDING CONTRACT PREFERRED.**—There being two permissible constructions of the contract in question which fairly express the meaning of the parties and which make a valid and binding instrument, and if it be conceded that a construction making the contract an executed sale is possible, under which it would be invalid, then the rule must be applied that a construction which establishes a valid contract is to be preferred to that which does not. (Id.)

See Agency; Damages; Debtor and Creditor; Guardian and Ward, 6; Mechanics' Liens, 9-11; Pawnbrokers, 5; Pleading, 1, 5, 6; Promissory Notes; Vendor and Vendee.

CORPORATIONS.

1. **BY-LAW—COMPOSITION AGREEMENT—AUTHORITY OF SECRETARY.**—A by-law of a corporation providing that "the president and secretary of this company shall constitute *ex officio* an executive committee, who shall attend to the business of the company, and who shall audit and pay the current bills of the company, all under the general direction of the board of directors," does not confer
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CORPORATIONS (Continued).

express authority on the secretary alone to execute a composition agreement; nor is such authority conferred on the secretary by a resolution of the board of directors empowering the president, vice-president, and treasurer to sign and indorse checks and drafts. (*Oscar Bonner Oil Company v. Pennsylvania Oil Company*, 658.)

2. **OSTENSIBLE AUTHORITY OF SECRETARY.**—The fact that the secretary of a corporation received a promissory note and represented his corporation in the transactions which led to its execution did not constitute him the agent, ostensible or otherwise, of the corporation to bind it by signing a composition agreement concerning the note. (*Id.*)

3. **GAS COMPANY—USE OF GAS FOR HEATING AND COOKING—FRANCHISE NOT FORFEITED.**—A gas company having the right and franchise to lay pipes in the streets for the purpose of supplying illuminating gas to the inhabitants of a city, under section 19 of article XI of the constitution, does not forfeit its franchise by the supply of gas for cooking and heating as well as for lighting purposes which does not subject the streets to any additional burden. (*The People ex rel. City of Los Angeles v. Los Angeles Independent Gas Company*, 557.)

4. **SUBSCRIPTIONS TO STOCK—LIABILITY LIMITED TO REGISTERED OWNER.**—The registered owner of the stock of a corporation is alone liable to the corporation for assessments or calls for payment of subscription, until a transferee thereof causes the transfer to be entered upon the books of the corporation or deals with the corporation as a substituted stockholder and is accepted by the corporation as such. (*People's Home Savings Bank v. Stadtmuller*, 106.)

5. **ACTION BY INSOLVENT BANK—CALLS FOR UNPAID SUBSCRIPTIONS—DIBUTEE OF STOCK NOT LIABLE.**—An action by an insolvent savings bank, which has called in all unpaid subscriptions to its stock, cannot be maintained against a distributee of stock whose name is not upon its books and who has done no act to establish privity with the corporation, it appearing that the stock still stands upon the books in the name of the decedent personally. (*Id.*)

6. **PLEADING — OWNERSHIP OF STOCK — CONCLUSION — UNCERTAINTY.**—An averment by plaintiff that defendant became and is the owner and holder of the stock, which is a mere conclusion from the facts specifically alleged as to the distribution of the stock to her, and that she "accepted" the certificate and retained the same, does not, as against a general demurrer and a special demurrer for uncertainty and ambiguity, show that defendant made herself liable for the unpaid portion of the subscription made by the decedent. [*Per Beatty, C. J., on petition for rehearing.*] (*Id.*)

7. **UNPAID SUBSCRIPTIONS—SUIT BY CREDITORS.**—A court of equity, at the instance of a creditor or creditors of an insolvent corporation, has jurisdiction to compel its stockholders to pay their subscriptions

CORPORATIONS (Continued).

in order to satisfy the corporate debts. (*Blood v. La Serena Land and Water Company*, 764.)

8. **CREDITOR AS STOCKHOLDER—SET-OFF—RATABLE CONTRIBUTION.**—A creditor of a corporation who is himself a stockholder, and indebted to the corporation for unpaid subscriptions, may maintain an action against other stockholders to enforce their liability on their subscriptions, and cannot be compelled to set off his liability on his own subscription against the indebtedness of the corporation due him. In such an action the plaintiff stockholder must contribute ratably with the defendant stockholders towards the liquidation of his demand against the corporation. (*Id.*)
9. **LIABILITY OF STOCKHOLDERS—JOINER OF PARTIES—EXTENT OF RECOVERY.**—The liability of the stockholders for unpaid subscriptions is several, and in a suit by a creditor of the corporation to enforce such subscriptions, it is not necessary to join all of the stockholders, and the creditor is not limited in his recovery to the amount represented by the proportion which the defendants' unpaid subscriptions bears to all unpaid subscriptions. The creditor may sue any one stockholder and recover from him his total debt, provided it does not exceed the amount of the defendant's liability for subscriptions. No different rule applies when the plaintiff himself is a stockholder. (*Id.*)
10. **BRINGING IN OTHER STOCKHOLDERS.**—In an action by a creditor stockholder against some of the stockholders of a corporation to enforce their liability for unpaid subscriptions, if the presence of the other stockholders was necessary to a complete adjudication of the rights of the parties, and a determination of the amount ultimately due from each, the defendants should have taken steps to have had such other stockholders brought in. (*Id.*)
11. **VOLUNTARY DISSOLUTION—FALSE STATEMENT AS TO INDEBTEDNESS—JURISDICTION TO DECREE DISSOLUTION.**—Where the proceedings for the voluntary dissolution of a corporation were in full accord with the provisions of sections 1227-1233 of the Code of Civil Procedure relating thereto, an alleged false statement in the application that all claims and demands against the corporation had been satisfied and discharged is not a matter going to the jurisdiction of the court to decree the dissolution; but the question as to the truth of this allegation was, so far as the dissolution proceeding was concerned, one solely for the determination of the court to which the application was made, and which found it to be true. (*Crossman v. Vivienda Water Company*, 575.)
12. **FRAUD UPON COURT—COLLATERAL ATTACK—ACTION BY CREDITOR AGAINST DISSOLVED CORPORATION.**—If it be assumed that the allegation was false in fact, and was a fraud upon the court, the decree of dissolution cannot be collaterally attacked on that ground in an action by a creditor to enforce its claim in a suit against the dis-

CORPORATIONS (Continued).

solved corporation, in which it is not sought directly to set aside the decree on the ground of fraud. (Id.)

13. **CONSTITUTIONALITY OF PROCEEDINGS FOR DISSOLUTION.**—The code provisions in the matter of the voluntary dissolution of corporations are not unconstitutional on the ground that the only notice required is by publication, and that the opportunity of creditors to recover is thereby restricted, and the obligation of contracts thereby impaired. The debts of the corporation are not vacated by its dissolution. In the absence of statute, equity treats the surviving assets as a trust fund for creditors and stockholders; and the obligation of contracts survives the dissolution of the corporation as effectually as in the case of the death of a private person. (Id.)
14. **ADMINISTRATION OF ASSETS AFTER DISSOLUTION.**—The provision for the administration of assets of a dissolved corporation in this state is regulated by section 400 of the Civil Code, providing that "Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation." This provision is applicable in all cases of dissolution, whether voluntary or involuntary. (Id.)
15. **EFFECT OF DISSOLUTION UPON ACTION AGAINST DISSOLVED CORPORATION—VOID JUDGMENT.**—There being no statute in this state to the contrary, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body or in its corporate name. There is no one who can appear and act for it; and all actions against it are abated, and any judgment attempted to be given against it is void, as much so as if it had been rendered against a dead natural person. (Id.)
16. **REMEDY AFTER DISSOLUTION.**—The remedy of a creditor after the dissolution of a corporation in this state is against the directors who continue such at the time of its dissolution and the stockholders. (Id.)
17. **VOID JUDGMENT COLLATERALLY IMPEACHABLE.**—A void judgment against a dissolved corporation may be collaterally impeached, and its invalidity shown by any one interested either as creditor or stockholder to participate in its assets, or a stockholder liable for its debts. In the absence of circumstances operating as an estoppel upon them to assert such invalidity they should be allowed so to do for their own protection. (Id.)
18. **MOTION BY STOCKHOLDERS TO VACATE VOID JUDGMENT.**—Stockholders, not estopped from doing so, may appear in the action in which a void judgment was rendered against a dissolved corporation at suit of a creditor commenced after its dissolution, to move to vacate such void judgment, and where such motion was made within six

CORPORATIONS (Continued).

months after the entry of the judgment it was not too late, assuming that the provision of section 473 of the Code of Civil Procedure is applicable to a case of this character. (Id.)

See Contract, 6, 7, 14; Estates of Deceased Persons, 11, 14; Municipal Corporations; Place of Trial, 2, 3.

COSTS.

1. **COSTS ALLOWED UPON APPEAL—CONSTRUCTION OF CODE—COST-BILL—SERVICE—CONSTITUTIONAL LAW.**—Section 1034 of the Code of Civil Procedure, in regard to the collection of costs awarded upon appeal, if taken strictly alone, would be unconstitutional, as allowing property to be taken without notice or an opportunity to be heard; that section must be construed with section 1033 of the Code of Civil Procedure as analogous, so as to require service of the memorandum of costs upon the opposite party and an opportunity for retaxation before execution can be properly issued thereupon, and if not so served, the memorandum of costs was properly stricken out, and execution thereupon was properly vacated and annulled. (*Bell v. Superior Court of the City and County of San Francisco*, 31.)
2. **PERSONAL JUDGMENT AGAINST EXECUTOR—DISCRETION—UNNECESSARY FINDING.**—The costs in an action to quiet title against an executor, which was contested by him, are an incident to a judgment for the plaintiff; and it was within the discretion of the court to award the costs against the executor personally, without any necessity of finding mismanagement or bad faith of the executor. (*Meyer v. O'Bourke*, 177.)
3. **GENERAL RULE AS TO COSTS AGAINST EXECUTOR INDIVIDUALLY—APPLICATION TO PROBATE COURT.**—In the absence of special statutes as to costs against an executor, the general rule is that costs should be imposed upon the executor individually, leaving him the right to seek an allowance for payment thereof from the probate court, which may allow it or not, according as his conduct in the suit may appear to it discreet or otherwise. (Id.)
4. **APPEAL BY EXECUTOR—CONSTITUTIONALITY OF STATUTE NOT INVOLVED—REMEDY BY INDIVIDUAL MOTION AND APPEAL.**—Upon appeal by the executor as such from the costs awarded against him, the estate is not an aggrieved party entitled to raise the question of the constitutionality of section 1509 of the Code of Civil Procedure. In order to have his objection thereto considered, he should have connected himself individually with the proceedings by motion for relief from the costs, and appeal in his individual capacity as a party aggrieved. (Id.)

See Mechanics' Liens, 13.

COUNTIES.

1. **COUNTY ADVERTISING—DELINQUENT TAX-LIST—PRICE FIXED BY SUPERVISORS—DISCRIMINATION—MOTIVES.**—Under subdivision 21 of section 25 of the County Government Act of 1897 the tax-collector has authority to procure the advertising of the delinquent tax-list at a price no greater than that annually fixed by the supervisors; and the validity of the action of the supervisors in fixing a less price per square for printing the delinquent list than for other county advertising, cannot depend upon the motives of its members to discriminate against plaintiffs' newspaper. (*Dodge v. Kings County*, 96.)
2. **REASONABLENESS OF DISCRIMINATION—SUPPORT OF FINDING.**—Where the court found upon sufficient evidence that there was good reason for excepting the publishing of the delinquent list from the general rates fixed for the other county advertising, and that the distinction made was not arbitrary or unnatural, its finding cannot be disturbed, and the judgment and order based thereupon will be affirmed. (*Id.*)

See Road District.

CRIMINAL LAW.

1. **GRAND JURY—COMPETENCY OF GRAND JUROR—VALIDITY OF INDICTMENT.**—Under sections 896 and 995 of the Penal Code the fact that one of the members of a grand jury had served and been discharged as a juror by a court of record of this state within a year of the time that he was summoned and impaneled to act as a grand juror does not affect the validity of an indictment found by the grand jury. (*Matter of Ruef*, 665.)
2. **HABEAS CORPUS—SUFFICIENCY OF INDICTMENT.**—On *habeas corpus* the inquiry into the sufficiency of an indictment is limited, and where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on *habeas corpus*. (*Id.*)
3. **ADMISSION TO BAIL—APPEARANCE FOR TRIAL.**—Under section 1129 of the Penal Code the trial court has discretion to grant or refuse bail to a defendant who has appeared for trial, and may commit him to custody to abide the judgment or further order of the court; and on an application on *habeas corpus* for admission to bail by a defendant under indictment the petition must affirmatively show that he has not appeared for trial. (*Id.*)
4. **INDICTMENT—REMAND ON HABEAS CORPUS—WRIT OF ERROR TO UNITED STATES SUPREME COURT—STAY OF PROCEEDING.**—Where a prisoner under indictment and awaiting trial in the superior court applied to another department of the same court for a writ of

CRIMINAL LAW (Continued).

habeas corpus, which was granted, and upon a hearing thereon he was remanded to custody, and thereupon applied for and obtained from the judge or court issuing the writ of *habeas corpus* a writ of error to the supreme court of the United States on the ground that the order of remand was in contravention of his rights under the constitution of the United States, the writ of error, if properly issued, did not operate to stay proceedings in the court having jurisdiction of the indictment. (*Ruef v. Superior Court of the City and County of San Francisco*, 657.)

5. ALLOWING WIFE IN HOUSE OF PROSTITUTION—SUFFICIENCY OF INFORMATION—LANGUAGE OF STATUTE—INTENT OF PROSTITUTION NOT INCLUDED.—An information following the words of the statute of 1891 (Stats. 1891, p. 285) and charging that defendant did willfully, unlawfully, and feloniously “connive at, consent to, and permit the placing and leaving” of his wife “in a house of prostitution,” specified, and did in like manner “allow and permit his said wife to remain in a house of prostitution,” is sufficient, and need not aver the facts not embodied in the statute, that she became a prostitute therein nor that there was an intent on his part that she should do so. (*People v. Conness*, 114.)
6. OTHER OCCUPATION IN BAWDYHOUSE — REASONABLENESS OF STATUTE—PUBLIC POLICY.—Though there is no moral turpitude *per se* in the occupation of cook, seamstress, or housemaid, yet it is not absurd or unreasonable or an undue restriction of the right to labor to forbid a husband from placing or leaving his wife or allowing her to remain in such occupation in a bawdyhouse, which is a place of the utmost moral pollution and social degradation, the existence and continuance of which a sound public policy and the avowed policy of the law requires should be discouraged and prevented. Such restrictions are in harmony with other restrictions upon bawdyhouses in the Penal Code and consistent with the public policy which they are intended to enforce. (*Id.*)
7. DEGREE OF PUNISHMENT—FELONY — MISDEMEANORS — LEGISLATIVE DISCRETION—CONSTITUTIONAL LAW.—Although the offense in question is made a felony, with the possible punishment of ten years in the state prison, while other offenses in bawdyhouses are made misdemeanors only, yet this inconsistency, conceding it to be such, is purely a matter of legislative judgment and discretion; and in view of the evils which this statute aims to prevent, and the large discretion of the legislative department of the state in such matters of policy, it cannot be said that this statute is in conflict with the prohibition of the constitution against the infliction of cruel and unusual punishment. (*Id.*)
8. EVIDENCE FOR DEFENSE—PROVINCE OF JURORS—IMPROPER REFUSAL OF INSTRUCTION.—Where there was evidence for the defense that he was anxious to have his wife leave the bawdyhouse, and tried to

CRIMINAL LAW (Continued).

induce her to do so, the credibility of such evidence was within the exclusive province of the jurors; and it was error to refuse an instruction to the effect that if the jury found from the evidence that no other facts were established in the case than that defendant was a married man whose wife resided in a house of prostitution, and that defendant knew that she was residing therein, they should permit no presumption of law against defendant from these facts, and it was their duty under the law to acquit him. (Id.)

9. CONSTRUCTION OF STATUTE—MEANING OF “ALLOW.”—The word “allow” used in the statute means more than mere “abstinence from prevention,” as defined by the court in instructing the jury. It has almost the identical meaning of the word “permit,” also used in the statute, and implies some sort of assent, active wish, or at least willingness, in his mind after he has knowledge of her presence in the bawdyhouse that she should continue there; something more than mere indifference to her whereabouts, or passive sufferance, in a case where the circumstances do not call upon him to interfere with her conduct. If he did not, in the first instance, directly or indirectly connive at, consent to, or permit of her going there, he must to some extent be an accomplice to her remaining thereafter he has knowledge of the fact. (Id.)
10. CONFUSING PART OF INSTRUCTION—DUTY AS TO PRESUMPTION OF LAW.—That portion of the instruction refused, that “it is still your duty to permit no presumption of law from these facts to be raised against the defendant,” though technically true, renders the instruction somewhat confusing, and might well have been eliminated, though it does not, in connection with the other parts of the instruction, render it erroneous as a whole. (Id.)
11. CROSS-EXAMINATION OF WITNESS FOR PROSECUTION—GENERAL QUESTIONS—DISCRETION OF COURT.—The court had discretion to refuse to allow general questions by the defendant on cross-examination of witnesses for the prosecution, as to whether or not they had previously talked with certain persons about their testimony, without any definite aim or disclosure of any specific statement of the witness inconsistent with his testimony, or of any declaration or conduct affecting his motive or showing bias. There must be a very clear and flagrant abuse of the discretion of the court in restricting a cross-examination, and apparent injury therefrom, to justify this court in reversing a case on account of it. (Id.)
12. MURDER—MOTIVE—COLLECTING INSURANCE MONEY—DESIRE FOR ELIGIBLE MARRIAGE—LETTERS.—When the evidence is sufficient to show that the homicide was committed by defendant for the purpose of collecting insurance money obtained by him on the life of the deceased, with the desire to commend himself as eligible for marriage with a young woman to whom he had represented that he was heir to an estate in an amount equal to the amount of

CRIMINAL LAW (Continued).

- such insurance, letters addressed to her stating that he would shortly come into such estate, and would be a wealthy man, were admissible upon the question of motive for the defendant for the crime committed. (*People v. Soeder*, 12.)
13. **LIFE POLICY PAYABLE TO FOREIGN SISTER—HANDLING OF PROCEEDS.**—The fact that the defendant had taken only an accident policy in his own name upon the life of the deceased, and had taken a life policy thereupon in the name of a sister of the defendant, who, according to defendant's statement, was the wife of the deceased, does not prevent the insurance policy taken in her name from being evidence of motive, where it is apparent that he expected to handle the proceeds thereof. (*Id.*)
14. **TESTIMONY OF CELLMATE FOR PROSECUTION—CONFESSION BY DEFENDANT—ACTION BY JUDGE—DEFENDANT NOT PREJUDICED.**—Though the trial judge is rigorously prohibited from action or word having the effect to convey to the jury his personal opinion as to the truth or falsity of any evidence, yet where a cellmate of the defendant had testified for the prosecution to a confession of the murder made to him by defendant, for the purpose of obtaining the insurance, it was not error for the court to elicit from the witness that he understood that the defendant was charged with murder, the penalty for which might be death, and to inform him, without intimating either way that his testimony was true or false, that "any person who by willful perjury secures the conviction and execution of any innocent person is punishable by death," and to elicit from him that, with that knowledge, he had no desire to change or correct his testimony. (*Id.*)
15. **EFFECT OF ADHERENCE TO TESTIMONY—PROVINCE OF JURY.**—The fact that the effect of the adherence of the cellmate to his testimony in the face of the information as to the penalty for willful perjury resulting in the conviction of an innocent person, was to strengthen that testimony in the minds of the jurors, was due solely to the fact that the jurors knew that he was testifying with that knowledge; and it was proper for them to know this fact and to take it into consideration with all other matters going to the credibility of the witness, in determining the weight to be given to his testimony. (*Id.*)
16. **CROSS-EXAMINATION OF DEFENDANT—QUESTIONS NOT PREJUDICIAL—TESTING CREDIBILITY—CONVICTION OF FELONY.**—Where the defendant voluntarily testified in his own behalf he became subject to the same rules of cross-examination for testing his credibility thereon as any other witness. When he denied that he committed the murder, he was properly asked on cross-examination where he was on that night at the hour of the death; and it was competent for the prosecution to show upon his cross-examination that he had been before convicted of a felony. (*Id.*)

CRIMINAL LAW (Continued).

17. **ARGUMENT OF DISTRICT ATTORNEY.**—It is not misconduct for the district attorney in his argument fully to state his views as to what the evidence shows and as to the conclusions to be fairly drawn therefrom. (Id.)
18. **MURDER—INSANITY—COMMITMENTS TO ASYLUM—EVIDENCE—AFFIDAVITS—EXAMINATIONS—CERTIFICATES.**—Upon a trial for murder, where the defense was insanity, and it appeared that defendant had been twice, prior to the day of the homicide, committed to a state hospital for the insane on account of alcoholism, and, after brief detention, had been discharged therefrom, the affidavits, reports of examining physicians and their certificates, upon those commitments, offered in evidence by the defendant, were properly rejected. The certificates were purely hearsay, and not admissible for any purpose. (People v. Willard, 543.)
19. **ABSENCE OF JUDGMENT-ROLL—COMMISSION A CREATURE OF STATUTE—STATUS NOT FIXED.**—There is no judgment-roll upon the commitment of a person to a state hospital for the insane, in the sense that it determines conclusively anything. The commission of physicians established in each county is purely a creature of statute, to determine whether the mental condition of the person examined is such as to warrant his detention in the asylum for treatment. It is not intended as a tribunal in which the *status* of the alleged insane person is fixed. (Id.)
20. **COMMITMENT ON DAY OF HOMICIDE—PROTEST BY DEFENDANT—SUBSEQUENT DISCHARGE ON HABEAS CORPUS—EVIDENCE—PETITION AND PROOF.**—Where the defendant was a third time examined and committed to the asylum on the day of the homicide, at the instance of deceased, against defendant's protest that he was not insane, and ought not to be sent there, and he subsequently voluntarily petitioned for a discharge upon *habeas corpus*, the petition presented, with its declaration as to his sanity, which it appears he read and understood, and his testimony on that question at the hearing, were admissible, as bearing on the question of his mental capacity when the homicide was committed. (Id.)
21. **DEFENSE OF INSANITY—RULE OF EVIDENCE.**—It is a rule of evidence in this state that, where the defense of insanity is interposed against a criminal charge, the acts and conduct of the accused at the time of, and within a reasonable time before and after, the alleged criminal act is committed may be presented to the jury upon the question of insanity existing at the time of its commission. (Id.)
22. **ADMISSIONS OF DEFENDANT—CONSTITUTIONAL RIGHTS.**—The admissions and statements of the defendant, and the testimony given by himself upon *habeas corpus* proceedings, bearing wholly on the question of his sanity, in which there is nothing that can be construed as amounting to a confession of guilt, are admissible against him, and are not violative of any of his constitutional rights not to

CRIMINAL LAW (Continued).

- be a witness in a criminal case against himself, whether they are voluntary or not. (Id.)
23. **REBUTTAL—ORDER OF PROOF—DISCRETION.**—Where upon rebuttal of the insanity of the defendant some evidence was allowed to be offered which might have been given in chief, it was within the discretion of the court to allow a departure from the order of proof, and the fact of such departure constitutes no ground of complaint where no abuse of discretion affirmatively appears. (Id.)
24. **MISCONDUCT OF DISTRICT ATTORNEY—HONEST MISTAKE AS TO EVIDENCE—CORRECTION BY COURT.**—An honest mistake by the district attorney as to evidence, as to which, after discussion, he was corrected by the judge, and which was not persisted in, does not constitute misconduct prejudicial to the defendant. (Id.)
25. **ARGUMENT OF DISTRICT ATTORNEY—INFERENCES FROM EVIDENCE.**—It was not objectionable for the district attorney in his argument to speak of certain inferences and deductions from the evidence which the jury should make where no statement was made of any facts which the evidence did not disclose. (Id.)
26. **BURDEN OF PROOF OF INSANITY.**—Where the defense of insanity is relied upon, the burden of proof rests upon the defendant to establish that defense by a preponderance of evidence. (Id.)
27. **CONFLICTING EVIDENCE—SUPPORT OF VERDICT.**—Where the homicide was admitted, and the evidence was conflicting as to the insanity of the defendant being such as would excuse him from crime, the verdict is sufficiently supported. (Id.)
28. **COMMITMENTS TO ASYLUM NOT CONCLUSIVE EXCUSE FOR CRIME.**—The several commitments of the defendant to the insane asylum do not prove that he was insane to the extent that the law would exempt him from responsibility for his criminal acts. A person may be partially insane upon one or several subjects, and for that reason be a proper person for confinement in a state insane asylum, to be cared for and treated for his mental disorder, and yet at the same time such person may be perfectly sane upon all other subjects and entirely responsible under the law for a criminal act committed by him. (Id.)
29. **INSANITY, WHEN AND WHEN NOT A DEFENSE.**—That insanity may be available as a defense to a crime charged it must appear that the defendant when the act was committed was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. Although he may be laboring under partial insanity, or an insane delusion, yet if he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, and to know that it is wrong and criminal and will subject him to punishment, he must be held responsible for his conduct. (Id.)

CRIMINAL LAW (Continued).

30. **EFFECT OF LAST COMMITMENT—EVIDENCE OF RATIONALITY—PRISON THREAT—QUESTION OF FACT FOR JURY.**—The commitment of the defendant to the asylum on the day of the homicide as being dangerous and laboring under an insane delusion is not conclusive, where there is counter evidence that he was rational on that day and prior and subsequent thereto, and also evidence to show that when last previously discharged he had threatened to kill any one who would send him there again. Under such evidence, it was a question of fact for the jury to determine whether at the time of the homicide defendant was insane, and to what extent; and their verdict that he was then sufficiently sane to be responsible therefor will not be disturbed. (Id.)

See Habeas Corpus.

DAMAGES.

1. **BREACH OF CONTRACT—MEASURE OF DAMAGES—PROBABLE RESULT CONTEMPLATED BY PARTIES.**—The only damages recoverable for breach of contract are such as the parties may be reasonably supposed, in the light of all the facts known or which should have been known to them at the time of making the contract, to have considered as the probable result of a breach, or as likely to follow therefrom, in the ordinary course of things, and therefore to have, in effect, stipulated against. Other damages are too remote and cannot be recovered. (*Hunt Brothers Company v. San Lorenzo Water Company*, 51.)
2. **BREACH OF CONTRACT FOR WATER SUPPLY—LOSS OF PREMISES BY FIRE, WHEN RECOVERABLE—DEFINITE CONTRACT.**—It is only where a definite contract calls for the continuance of an instituted water service for the purpose of extinguishing fires, or calls for a service to be instituted at a definite time, under circumstances known to the parties, making it essential that particular protection from fire should then commence, that loss of the premises by fire may be recovered as having been reasonably supposed to have been within the contemplation of the parties. (Id.)
3. **INDEFINITE CONTRACT—REMOTE DAMAGES.**—Under an alleged contract for a general water supply and for a fire-hydrant to be installed, in which no definite time appears to have been fixed for its commencement, and no special circumstances appear making it essential that the agreed service should be commenced at any particular time, or within a reasonable time, and the rate agreed upon was to begin only when the service was installed, damages resulting from the loss of the premises by fire before the installation of such service, are too remote to be considered as within the contemplation of the parties and cannot be recovered. (Id.)

See Negligence, 22, 23; Statute of Limitations, 3.

DEBTOR AND CREDITOR.

COMPOSITION AGREEMENT—CONTRACT.—The contract set forth in the opinion, *held*, not to be a composition agreement, and not to be a bar to the plaintiff's cause of action. (*Reynolds v. Pennsylvania Oil Company*, 629.)

See Corporations, 7-10, 15-18; Fraudulent Conveyance.

DEEDS.

1. **GRANTEE—UNINCORPORATED “CHURCH COMMUNITY”—POSSESSION AND USE NOT TAKEN—TITLE NOT PASSED—DEED UNDER EXECUTION AGAINST GRANTOR.**—A deed to an unincorporated “church community” for “school and church purposes,” not naming its members or any other grantee, under which it appears that no possession was taken or use had of the property conveyed for any purpose by the “church community” or its members, or by any one claiming to act for it, and that no claim thereto has been asserted by or for its members, passed no title, legal or equitable, from the grantor, and a sheriff's deed under execution against him passed the title as against his subsequent grantee. (*Rixford v. Zeigler*, 435.)
2. **GENERAL RULE APPLICABLE—GRANTEE MUST BE CAPABLE TO TAKE.**—In such case the general rule applies that to make a deed effective the grantee must be a person either natural or artificial, capable of taking the property conveyed, and that a deed is void unless the grantee named has such capability. (*Id.*)
3. **EXCEPTION AS TO GRANT FOR CHARITABLE PURPOSES INAPPLICABLE—RULE IN EQUITY.**—The exception to the general rule that where a grant for charitable purposes is sought to be enforced by beneficiaries, who have taken possession of the property granted, and have continuously used the same for such purposes, equity will devise plans for carrying it out, has no application to the facts of the present case. (*Id.*)
4. **DEED OF QUARRY—LIMITATION OF PURPOSE—CONSTRUCTION—RESERVATION—CONDITION—INJUNCTION.**—A deed of land for the use of a railroad way to stone quarries, and of the quarry tract, “for the purpose and with the limitation that the rock and material taken therefrom by the party of the second part, or by its lessees or assigns, is for railroad purposes,” and that they are “not to carry on the business for any other purpose,” with a subsequent condition that the estate is to be forfeited if the railroad is not constructed to the quarries within two years, is not to be considered as inconsistent in its provisions; but the “limitation,” whether considered as a covenant running with the land or not, is not in restraint of trade, but is to be taken as qualifying the estate granted, for the benefit of the grantors, and as in effect a reservation to be liberally construed in favor of the grantors, and their successors, and as forbidding the taking of stone for any

DEEDS (Continued).

other purpose; and equity will, at the suit of the successors of the grantors, enjoin the taking thereof for the use of a breakwater by the assigns of the grantee. (*Pavkovich v. Southern Pacific Railroad Company*, 39.)

5. **CONTINGENT INTEREST IN LAND—PROTECTION AGAINST WASTE BY INJUNCTION—DAMAGES.**—The owner of a contingent future estate in land is entitled in equity to enjoin a threatened destruction of the substance of that estate by the tenant in possession, whether such threatened destruction be total or partial; and when land is conveyed subject to a condition a breach of which will work a forfeiture of the estate granted, the grantor retains an interest in the land the value of which may be impaired by waste; and if the deed expressly limits the purposes for which stone may be taken from a quarry, and which imposes a practical limit to the quantity to be taken, the owner of the contingent estate, though not entitled to recover damages for rock actually removed, is entitled to enjoin further waste in the taking of rock in excess of such limit. (*Id.*)
6. **STIPULATION IN FAVOR OF AND AGAINST GRANTEE.**—Where the assigns of the grantee were expressly named in the deed, whatever right the grantors had to protect their interest in the land passed to their grantee and inured in his favor against the assigns of the original grantee. The estate of the grantors was alienable; and their right to sell the estate includes the right to transfer the means of protecting it. (*Id.*)

See Attachment, 2, 3; Ejectment; Mistake, 1-5; Trust.

DEVISE AND LEGACY. See Estates of Deceased Persons, 5-10; Wills.

DISMISSAL. See Practice, 2, 3.

DIVORCE.

1. **ALIMONY—RECEIVER—JURISDICTION.**—The superior court has full jurisdiction to appoint a receiver in an action for divorce, either for the purpose of enforcing payment of alimony and expense money previously ordered paid, or for the purpose of enforcing a previous order requiring the husband to furnish security for such payment, or for the purpose merely of providing such security, at all times during the pendency of the action, prior to the filing of an undertaking to stay proceedings upon appeal from the order to pay alimony and costs. (*McAneny v. Superior Court of Santa Clara County*, 6.)
2. **STAY OF PROCEEDINGS UPON APPEAL.**—A stay of proceedings upon appeal from the alimony order operates as a *supersedeas*, and deprives the superior court of all power to enforce the order

DIVORCE (Continued).

- appealed from, either by execution or by proceedings for contempt, or through the appointment of a receiver. (Id.)
3. PROHIBITION—ORDER PENDING STAY OF PROCEEDINGS—ADEQUATE REMEDY—WRIT OF SUPERSEDEAS.—A writ of prohibition will not lie to prevent the enforcement of the order appealed from pending the stay of proceedings upon appeal, there being a plain, speedy, and adequate remedy in the ordinary course of law, upon a motion in this court, to stay the hand of the lower court in any proceeding to enforce the order, whether it be judicial or ministerial. (Id.)
4. OBJECTION IN TRIAL COURT.—In such a case, objection to the jurisdiction of the trial court to appoint a receiver pending such stay of proceedings upon appeal should be first made in the trial court, upon notice to it of such stay, where there is opportunity to do so before a writ of prohibition is asked for in this court. (Id.)
5. JUDGMENT FOR ALIMONY—COLLATERAL ATTACK—DEFECTIVE COMPLAINT—PRAYER FOR GENERAL RELIEF—JURISDICTION.—A judgment for alimony included in a judgment for divorce based upon a complaint stating a cause of action for divorce for extreme cruelty, but containing no averments concerning property or the husband's ability to pay alimony, and containing only a prayer for divorce and for general relief, is not void upon its face nor subject to collateral attack. The defect in the complaint does not go to the jurisdiction to include alimony in the judgment. (Cohen v. Cohen, 99.)
6. REMEDIES IN SUPERIOR COURT.—The superior court has no power to set aside such judgment for alimony as an act done without jurisdiction. It can be modified therein as in excess of the relief specifically prayed for in case of default only by proceedings under section 473 of the Code of Civil Procedure, or by proceedings in equity. (Id.)
7. APPEAL FROM ORDER MODIFYING AND VACATING PERMANENT ALIMONY—REMARRIAGE OF PLAINTIFF—JURISDICTION NOT REVIEWABLE.—Upon an appeal from an order of the superior court modifying the judgment as to permanent alimony by enforcing it for accrued payments and vacating it from a fixed date, under a motion to vacate and modify it solely on the ground that equity and justice required that it should be vacated because of the remarriage of the plaintiff, the original jurisdiction of the court to render the judgment for alimony is not reviewable. (Id.)
8. RIGHT OF HUSBAND TO VACATE ALIMONY UPON REMARRIAGE OF WIFE—EXCEPTIONS—PRESUMPTIONS.—The divorced husband may, in general, secure an order vacating the decree for permanent alimony upon remarriage of the divorced wife, excepting where it appears to have been awarded in lieu of the wife's rights of property, or where it appears that the second husband is unable to support her. In the absence of any averments of the complaint as to the hus-

DIVORCE (Continued).

band's property and of any showing to the contrary, it must be presumed that the alimony allowance had no other basis than her husband's general obligations of support and maintenance; and in the absence of any showing that the second husband is unable to support her, his ability to do so must be presumed; and where no rights of children are involved, all alimony accruing after the remarriage should be vacated. (Id.)

9. **LACHES NOT IMPUTABLE TO HUSBAND—ESTOPPEL OF WIFE.**—The delay of the defendant in proceeding for a vacation of the decree for a period less than the statute of limitations does not constitute laches, where it appears that he had no actual knowledge of the allowance and nothing was said about it in the complaint, and before the decree the wife made a conditional agreement in writing with the husband that she would not ask alimony, and not long after the decree she removed from the state and remarried in another state nine months after the divorce, and gave him no notice that she had obtained such allowance. The wife in such case is estopped to complain of the delay of the husband; and he was not required to proceed to avoid a liability of which he was ignorant. (Id.)
10. **ASSIGNMENT OF UNDEMANDED ALIMONY AFTER REMARRIAGE—CAVEAT EMPTOR—SUBJECTION TO ATTACK.**—A judgment for alimony is not a negotiable instrument; and where it was assigned long after the wife's remarriage, and no part of it had ever been paid or demanded from the husband, it is eminently a case for the application of the maxim *caveat emptor*, and the assignee purchasing the judgment got the right he bought and no more. The judgment is subject to the same attack in his hands as it would have been had it remained in the name of the original plaintiff; and he is not entitled to enforce any unpaid alimony accruing after the plaintiff's remarriage. (Id.)

DUPONT-STREET BONDS.

1. **SPECIAL FUND—JUDGMENT AGAINST CITY NOT SUPPORTED BY COMPLAINT—FAILURE TO PAY BONDS.**—The Dupont-Street bonds issued by the city and county of San Francisco under the act of March 23, 1876, for the widening of Dupont Street, were payable only out of a fund to be raised by taxation of lands within a specified district declared to be benefited. All claims against the city were waived, and it cannot be held liable to a personal general judgment. Where no breach of duty was alleged in an action against the city except failure to pay the bonds, the complaint cannot support a judgment against the city. (Meyer v. City and County of San Francisco, 131.)
2. **FUND NOT ALLEGED NOT PRESUMED—MANDAMUS NOT SUPPORTED.**—Where the complaint did not allege the existence of a fund

DUPONT-STREET BONDS (Continued).

sufficient to pay the bonds, such fund cannot be presumed; but the complaint having failed to allege an existing duty and a failure to perform it on demand, cannot support a *mandamus*, which only lies to compel the performance of an act which the law especially enjoins as duty resulting from an office, trust, or station. (Id.)

3. **RIGHT OF ACTION TO ESTABLISH BONDS—PREVENTION OF BAR OF STATUTE—PRAYER OF COMPLAINT DISREGARDED.**—Though the plaintiff has no right of action for a general judgment against the city, or for a writ of mandate, yet he is entitled to maintain the action in order to establish the bonds, and to prevent the bar of the statute of limitations thereupon; and a judgment may be rendered establishing the debt for that purpose. The prayer of the complaint for a general judgment against the city may be disregarded as not measuring the plaintiff's rights; and since the complaint entitles him to some relief, a general demurrer thereto was properly overruled. (Id.)
4. **ERRONEOUS JUDGMENT UPON PLEADINGS—INTEREST AFTER MATURITY NOT ALLOWABLE.**—Not only was the general judgment against the city erroneous, but it was further erroneous in rendering judgment upon the bonds for interest after maturity, for which the statute does not provide. The provision is only for coupons to be attached for each year's interest accruing up to the time of maturity; and no coupons being attached for interest accruing after maturity, the statute must be understood as intending that no such interest was to accrue. Section 1917 of the Civil Code does not apply. (Id.)
5. **OVERISSUE OF BONDS—VALIDITY—INSUFFICIENT DEFENSE.**—In case of an overissue of the bonds, they would all be valid except those issued after the limit was reached; and a defense alleging such overissue without alleging that plaintiff's bonds were included in the overissue is insufficient. (Id.)
6. **EFFECT OF LIMITED JUDGMENT—PARTIES NOT AFFECTED—RIGHTS OF PROPERTY-OWNERS.**—The limited judgment establishing the bonds and removing the bar of the statute may be rendered without making the property-owners parties; but a judgment having that effect against the city alone would not bind the owners of the property nor estop them from showing that the bonds were invalid or not enforceable for other reasons. (Id.)
7. **QUESTIONS AFFECTING PROPERTY-OWNERS.**—The questions whether in view of the recitals on the face of the bonds the defense of overissue can be raised against the plaintiff, and whether judgments enjoining the tax-collector from collecting the tax against certain property-owners, bind the city and the bondholders who were not parties thereto, are questions which should not be determined in the absence of the property-owners as parties. (Id.)

DUPONT-STREET BONDS (Continued).

8. REVERSAL OF JUDGMENT—PARTIES.—Where the case is remanded by reason of the erroneous judgment, the property-owners should be made parties, if plaintiff desires to attempt in this action to obtain judgment for any relief other than the special relief grantable against the city alone. (Id.)

EASEMENT. See Mistake, 18; Streets, Roads, and Highways.

EJECTMENT.

1. EJECTMENT AGAINST TENANT OF ADMINISTRATOR—DEFENSE.—A defendant in ejectment, claiming the right to the possession of the land sued for as the tenant of the administrator of a deceased prior owner, may set up any defense which the administrator could have urged to the action. (Doherty v. Courtney, 606.)
2. EQUITABLE TITLE AS DEFENSE IN EJECTMENT—RIGHT OF POSSESSION.—Under the California system of procedure, where legal and equitable remedies are administered in the same tribunal, and there are no special forms of action, a defendant may set up by way of equitable defense any matter which would, if presented by him as the basis of an original bill in equity, have entitled him to a judgment for the relief sought by his answer. This rule entitles the owner of a mere equitable title to land, if it is of such a character as entitles him to possession in equity, to set it up as a sufficient defense to an action for the possession, brought even by the holder of the legal title. (Id.)
3. REPRESENTATIVE MAY ATTACK DEED MADE BY DECEDENT—UNDUE INFLUENCE.—In this state, an administrator or executor may maintain an action to set aside a deed made by his intestate or testator on the ground of undue influence exercised by the grantee; and a tenant of the administrator, if sued for the possession by a *mala fides* purchaser from such grantee, may set up as a defense that the deed was obtained by undue influence. (Id.)
4. EVIDENCE OF MENTAL CONDITION OF DECEDENT—WANT OF CONSIDERATION.—In an action by a purchaser from the grantee under such deed, to recover possession of the land from a tenant of the administrator in which the answer alleged that the decedent at the time of making the deed was "much impaired and weakened in mind and body, and incapable of properly taking care of property or property interests," evidence is admissible as to the mental condition of the decedent at the date of the execution of the deed, and to show that the plaintiff had paid no consideration for the deed to him. (Id.)
5. NAKED LEGAL TITLE—MISTAKE IN DESCRIPTION OF LOTS SOLD—POSSESSION UNDER EQUITABLE TITLE—DEFENSE—REFORMATION NOT REQUIRED.—Where the plaintiff in ejectment, having notice of the equities of the defendants, acquired the naked legal title of a vendor

EJECTMENT (Continued).

in one of two lots, both of which were actually sold and possession thereof delivered by the vendor to the vendee, under a deed describing the acreage of both lots, but by mistake describing the metes and bounds of one lot only, the defendants, as subsequent grantees of such vendee, who are in actual possession of a part of each of said lots, having full equitable title to the part of one of them not fully described in the deed, may defend the action upon such equitable title without the necessity of a reformation of the deed. (King v. Dugan, 258.)

6. **RECORDED MAP—DEDICATION OF STREETS BY VENDEE—ESTOPPEL IN PAIS—NOTICE—STREETS NOT RECOVERABLE.**—Where defendants acquired title to their lots bounded by streets shown upon a map recorded by the original vendee, they have an equitable right to the use of such streets by way of estoppel *in pais* against the vendee and all claiming under him; and where plaintiff claimed under him by subsequent deed, and took with notice of their rights to the use of the streets under such map, plaintiff cannot recover any part of the legal title in such streets. (Id.)
7. **EFFECT OF DECREE QUIETING PLAINTIFF'S TITLE AGAINST ORIGINAL VENDOR—TRANSFER OF NAKED TITLE.**—A decree obtained by plaintiff claiming under such subsequent deed, quieting his title to the lot in controversy against the original vendor of the two lots, only had the effect to transfer the naked legal title of such vendor to the plaintiff in ejectment, who, having taken with notice of all of the equitable rights of the defendants, such equitable rights are a complete defense to his action upon the bare title. (Id.)

EQUITY. See Injunction; Mistake.

ESTATES OF DECEASED PERSONS.

1. **SUCCESSION FROM ILLEGITIMATES—CONSTRUCTION OF SECTIONS 1388 AND 1386 OF CIVIL CODE.**—Section 1388 of the Civil Code, which prior to its amendment provided "if an illegitimate child, who has not been acknowledged or adopted by his father, dies intestate, without lawful issue, his estate goes to his mother, or in case of her decease, to his heirs at law," established the rule of succession to the whole estate of an illegitimate, not acknowledged or adopted by his father, who dies intestate without lawful issue, except in so far as it may be qualified by section 1387 of that code; and this rule, being contrary to the general rules of succession prescribed by section 1386, must prevail over anything contained in that section, as that section, by its express terms, is limited to cases not otherwise expressly provided for. (Estate of De Cigaran, 682.)
2. **SUCCESSION BY HEIRS OF MOTHER OF ILLEGITIMATE—SURVIVING HUSBAND EXCLUDED.**—Under section 1388 of the Civil Code, where an illegitimate woman who had never been acknowledged or adopted

ESTATES OF DECEASED PERSONS (Continued).

- by her father dies intestate without issue, leaving a husband her surviving, her entire separate property is succeeded to by the heirs at law of her mother to the exclusion of her surviving husband. (Id.)
3. **SUCCESSION BY ILLEGITIMATE HALF-SISTER OF ILLEGITIMATE.**—Under section 1387 of the Civil Code an illegitimate child is an heir of his mother, and where an illegitimate woman, who had never been acknowledged or adopted by her father, dies intestate without issue, leaving surviving a husband, and an illegitimate half-sister by another father, as the sole heir at law of her mother, her entire separate estate is succeeded to by her illegitimate half-sister, to the exclusion of her surviving husband. (Id.)
4. **LEGISLATURE DETERMINES SUCCESSION.**—The question as to whether a surviving spouse of an illegitimate should inherit is one solely for the legislature, and the courts cannot substitute their own views thereon for the views of the lawmaking power. (Id.)
5. **EFFECT OF WILL OF DECEDENT—GENERAL LEGACIES—SPECIFIC DEVISES AND LEGACIES—CONSTRUCTION OF CODE.**—Under section 1360 of the Civil Code, read together with sections 1357, 1359, and 1362 thereof, specific devises and legacies given in the will of a decedent are free from any contribution to the payment of general legacies given therein. (Estate of Painter, 498.)
6. **TEST OF SPECIFIC DEVISES AND LEGACIES.**—Though the definition of a specific legacy in section 1357 of the Civil Code refers in terms only to legacies, yet the question whether a testamentary gift is specific or general is to be determined by the same tests where the subject of the gift is real property as where it is personal property. (Id.)
7. **LAND SPECIFICALLY DEVISED TO RESIDUARY LEGATEES—PARTIAL DISTRIBUTION.**—Where land definitely described and distinguished from all other parcels of land or property was devised to the residuary legatees in connection with a residuary devise and bequest to them of all other real and personal property not otherwise appropriated, the land so described and devised must be deemed specifically devised, and a partial distribution thereof may be awarded to the devisees, as against general legatees. (Id.)
8. **QUESTION OF INTENT.**—The question whether the testator intended to make a specific devise or bequest to those whom he has constituted his residuary legatees or the contrary is one purely of construction, to be determined from the language employed; and the question whether or not the testator at the time of the execution of the will and codicil had sufficient personal property to pay all the general legacies mentioned in the will is a circumstance bearing on his intent. (Id.)
9. **OWNERSHIP OF HALF-INTEREST IN FIRM.**—Where there was sufficient evidence to show that the half-interest of the decedent in a

ESTATES OF DECEASED PERSONS (Continued).

firm was enough to pay the indebtedness and leave a surplus, which would be adequate to discharge the general legacies under the will, the devises of the real estate by specific description to the residuary legatees must be deemed specific. (Id.)

10. **EVIDENCE—STATEMENT BY TESTATOR.**—A paper shown to be in the handwriting of the testator, purporting to contain a statement of the assets and liabilities of the partnership in which he owned one-half interest was competent evidence to show the testator's belief as to the *status* of the business. (Id.)
11. **CORPORATIONS—LIABILITY OF STOCKHOLDERS—UNTENABLE ACTION BY CREDITORS AGAINST DISTRIBUTED ESTATE OF STOCKHOLDER.**—Creditors of an insolvent banking corporation, who became such subsequent to the settlement of the final accounts of the executors of a deceased stockholder, who presented no claim against the estate, cannot, after distribution of the estate, which closed it so far as any claims against it were concerned, maintain any action against the executors to enforce the personal liability of the deceased stockholder. (*Childs v. de Laveaga*, 281.)
12. **PENDENCY OF APPEALS FROM DECREE.**—The pendency of appeals from the decree of distribution which only involved the rights of the distributees as between themselves, cannot affect the right of the creditors of the corporation to maintain such action after the entry of the decree appealed from. (Id.)
13. **AFFIRMANCE OF JUDGMENT UPON MOTION—TERMINATION OF APPEALS FROM DECREE—DISCHARGE OF SURVIVING EXECUTOR.**—A motion by the respondent to affirm the judgment should be granted upon the record showing that the action was commenced after the original decree of distribution, as well as for the reasons appearing from a showing that the appeals therefrom had been finally determined, and the estate finally distributed, and the sole surviving executor, respondent, as well as the estates of the deceased executors, had been finally discharged from all liability, so that no administration is pending, and no relief asked for by the appellants could be made applicable or be enforced. (Id.)
14. **INSOLVENT CORPORATION—ACTION UPON SUBSCRIPTION BY DECEDENT—DISTRIBUTION—CLAIM NOT PRESENTED—DISCHARGE OF EXECUTORS AFFIRMANCE OF JUDGMENT.**—Where it appears that an action by an insolvent corporation upon a subscription to its stock by decedent was commenced after distribution of the estate and without any presentation of claim against it, and a judgment was rendered against it upon demurrer to the complaint, and that pending the appeal therefrom the surviving executor and the estates of deceased executors were discharged after final settlement of all accounts, and there is no estate, nor any executor to represent it, and the further prosecution of the action can be of no avail to the appellant, the judgment will be affirmed on that ground. (*Union Savings Bank of San Jose v. de Laveaga*, 395.)

ESTATES OF DECEASED PERSONS (Continued).

15. **APPEAL FROM JUDGMENT—REVIEW—ERROR IN RECORD AS TO VARIANCE.**—Upon appeal from the judgment, it is held to be an error of the court to conclude that there was such a variance between the facts set forth in the second claim, on which the action was brought, and the facts proven by plaintiffs and found by the court, as to preclude a recovery. There was no material variance; but the cause of action established by the findings is the same as that attempted to be set out in the claim and the complaint, neither of which showed a prohibited transaction. (*Pollitz v. Wickersham*, 238.)
16. **SUFFICIENCY OF CLAIM AGAINST ESTATE.**—A claim against an estate is not required to state the facts with all the preciseness and detail required in a complaint, and its sufficiency is not to be tested by the rules of pleading. The claim in this case was not invalid upon its face. (*Id.*)
17. **REVERSAL OF JUDGMENT—NEW TRIAL.**—In reversing the judgment this court has power to order a new trial of the issues between plaintiffs and defendant; and, this court having affirmed an order granting a new trial involving a question of fact as to the validity of the plaintiffs' claim, it is a proper case for granting such new trial rather than to order a judgment for the plaintiffs, which might work an unjust conclusion. (*Id.*)

See Attachment, 1; Costs, 2-4; Ejectment, 1-3; Mistake, 6-17; New Trial, 1, 2; Parties; Wills.

ESTOPPEL. See Divorce, 9; Ejectment, 6; Insurance, 16, 17, 23; Water and Water-Rights, 17.

EVIDENCE.

1. **ACTION TO ESTABLISH WAY—PRESCRIPTIVE TITLE—CONFLICTING EVIDENCE.**—In an action to establish a way resting upon a title by prescription, where the court found for the plaintiff, and there was evidence for the plaintiff to the effect that the way across defendants' land had been used in connection with plaintiff's land continuously and without interruption for thirty-one years, and that it was adverse in its inception, a *prima facie* title by prescription was established; and the conclusion of the lower court against the credibility of conflicting evidence as to the use being permissive will not be disturbed upon appeal. (*Fleming v. Howard*, 28.)
2. **TESTIMONY OF HOSTILE WITNESS—DECLARATIONS FAVORABLE TO OPPOSITE SIDE.**—Where a hostile witness uses expressions favorable to the side he opposes, the court may properly attach more importance thereto than to the main purport of his narrative. (*Id.*)
3. **BOOKS OF BANK.**—The books of a bank are admissible in evidence for the purpose of showing the state of the account of one of its

EVIDENCE (Continued).

customers with it. (*L. W. Blinn Lumber Company v. McArthur*, 610.)

See Agency, 1, 2; Appeal, 1, 2, 4; Attorney and Client, 1-4; Boundary; Contract, 7, 8, 13-15; Criminal Law, 18, 21-23, 25-30; Ejectment, 4; Estates of Deceased Persons, 10; Fraudulent Conveyance; Mistake, 16; Negligence, 23-26, 28, 31; New Trial, 12-14; Promissory Note, 4, 5, 8; Trust, 2.

EXECUTORS AND ADMINISTRATORS. See Estates of Deceased Persons.

FINDINGS.

1. **APPEAL FROM JUDGMENT—FINDING OF NON-PAYMENT BY SINGLE DEFENDANT.**—Upon an appeal from the judgment upon the judgment-roll alone, the language of findings is to be given the broadest possible meaning, whenever it is necessary to do so in order to support the judgment; and the finding that the defendant who had appeared had not paid for the services is equivalent to a finding that the same had not been paid, either by himself in person or by his co-obligors. (*Bell v. Adams*, 772.)
2. **CONSTRUCTION OF FINDINGS.**—If findings of fact are reasonably susceptible of such a construction as will support the judgment, they must receive that construction rather than one which will not support it. (*People v. McCue*, 195.)
3. **FAILURE TO FIND UPON AFFIRMATIVE DEFENSE—ABSENCE OF EVIDENCE.**—The failure of the court to find upon an affirmative defense pleaded in the answer is immaterial where there is no evidence in the record, and it does not appear that any evidence was introduced in support of such defense. (*Id.*)

See Boundary; Mechanics' Liens, 7, 8; Mortgage, 2-4, 8; New Trial, 11-13; Nuisance, 3; Partition, 1; Promissory Note, 12; Quieting Title, 3; Statute of Limitations, 5; Streets, Roads, and Highways, 1.

FIRE INSURANCE. See Insurance.

FRANCHISE. See Corporations, 3; Municipal Corporations, 11; Streets, Roads, and Highways, 6-8.

FRAUD. See Corporations, 12; Injunction, 3, 4.

FRAUDULENT CONVEYANCE.

VOLUNTARY CONVEYANCE BY INSOLVENT—SUBSEQUENT CREDITORS—EVIDENCE.—Under section 3442 of the Civil Code, any transfer made or given voluntarily or without valuable consideration, by a party while insolvent, or in contemplation of insolvency, is fraudulent

FRAUDULENT CONVEYANCE (Continued).

and void as to existing creditors, and a conveyance so made is *prima facie* evidence of fraud against subsequent creditors; and in an action involving the *bona fides* of such a conveyance, it is for the trial court to determine whether the *prima facie* case of fraud has been overcome by other testimony. (*Hemenway v. Thaxter*, 737.)

GRANTOR AND GRANTEE. See Deeds.

GUARDIAN AD LITEM. See Negligence, 33-35.

GUARDIAN AND WARD.

1. **SETTLEMENT OF FINAL ACCOUNT—NOTICE REQUIRED—CONSTRUCTION OF CODE.**—Under section 1789 of the Code of Civil Procedure, providing that the proceedings for the settlement of the account of a guardian, and the notice required thereof, are the same as those required upon the settlement of the accounts of an executor or administrator, section 1634 of that code, providing for a final settlement of the accounts of an administrator or executor upon petition for distribution, is applicable as to the notice required for the settlement of the final account of a guardian, and notice must be given for the full period of ten days before the hearing. (*Livermore v. Ratti*, 458.)
2. **DEATH OF WARD—SETTLEMENT WITH ADMINISTRATOR—NOTICE OF HEARING.**—Upon the death of a ward, before settlement of the final account of the guardian, the guardian is required, under section 1754 of the Code of Civil Procedure, to settle his accounts with the legal representative of the ward, who must have actual or constructive notice of the hearing for the period of ten full days in his representative capacity to make it at all effective. (*Id.*)
3. **DELAY OF GUARDIAN TO SETTLE WITH WARD—INSUFFICIENT NOTICE TO ADMINISTRATOR—JURISDICTION—VOID SETTLEMENT AND LIEN.**—Where a guardian delayed settlement with the ward after becoming of age, and presented the final account after her death, while petition for letters upon the ward's estate was pending, and the administrator thereof was appointed seven days before the hearing, and did not appear thereat, or have constructive or actual notice as administrator for the required period, the court had no jurisdiction to settle the account, or to impose a lien for the balance of account upon the real estate of the deceased ward, and the order settling the account and imposing such lien was void. (*Id.*)
4. **ACTION TO FORECLOSE LIEN—RECITALS IN RECORD—POSTING OF NOTICES—APPEARANCE NOT PRESUMED—EVIDENCE TO SHOW WANT OF JURISDICTION.**—In an action to foreclose such lien against the estate of the deceased ward, where the recitals in the record settling the account of the guardian show that notice thereof was given by posting, it will not be presumed that jurisdiction was acquired by

GUARDIAN AND WARD (Continued).

appearance; and evidence is admissible to show that the legal representative of the ward's estate was not in existence to receive notice during a necessary part of the ten days required. (Id.)

5. **FORECLOSURE OF GUARDIAN'S MORTGAGE BY WARD—RELEASE BY GUARDIAN—PARTIES—FAILURE OF WARD TO TESTIFY—INSTIGATION OF ACTION—WANT OF EQUITY.**—In an action by an adult ward to foreclose a mortgage executed to him by his guardian more than twenty years previously, when the ward was one year old, to secure money "borrowed" or appropriated by the guardian without order of court, and which was released by the guardian without order of court, in favor of subsequent mortgagees and purchasers, made parties defendant with the guardian, where the plaintiff failed to testify whether the guardian had settled with him or not, or whether anything was due, and where it appears that plaintiff lived with and had been always supported by his guardian, who was his step-father, and that the action was instigated and controlled by the guardian defendant and plaintiff's mother, it is sufficiently shown to be without equity. (*Cummings v. Strobridge Land Syndicate*, 209.)
6. **CONTRACTS—PARTIES—INCAPACITY OF INFANT WARD.**—There must be two parties to every contract; and a note and mortgage to be of any validity must be legal contracts. An infant one year of age, being plainly incapable of contracting, it may be seriously doubted whether any contract could be said to exist at all between the guardian and his infant ward. (Id.)
7. **MISAPPROPRIATION OF MONEY—EMBEZZLEMENT.**—The money alleged to have been "borrowed" from the infant and appropriated to the guardian's use without any order of court was misappropriated or embezzled by him; and the note and mortgage to the ward could be no defense to such embezzlement. (Id.)
8. **EFFECT OF RELEASE—MONEY BORROWED FROM NEW MORTGAGE—WARD'S PROPERTY—MAXIM OF EQUITY.**—Where the release of the mortgage by the guardian without an order of court was made to induce another mortgagee to advance money to the guardian in the same amount, his intention not to make it the ward's money is immaterial. Equity makes such money the property of the ward, in pursuance of its maxim that it will regard as done that which ought to be done. (Id.)
9. **SECOND EMBEZZLEMENT.**—Any misappropriation of the ward's money received from such other mortgagee in consideration of the release of the first mortgage made to the ward for money embezzled was only a second embezzlement of the ward's money. (Id.)
10. **PROTECTION OF INNOCENT PURCHASERS—CLEARING OF UNDISCLOSED LIEN—CONSEQUENCES OF FURTHER MISAPPROPRIATION.**—Where innocent purchasers of the mortgaged property paid full value therefor to the guardian, in honest ignorance of the situation, and

GUARDIAN AND WARD (Continued).

relying upon the absence of any apparent encumbrance of record; conceding that the ward had in fact an undisclosed lien upon the property, so much of the money paid by the purchasers as may be necessary to clear this lien must be deemed taken by the guardian as money of the ward; and if the guardian thereafter made further misappropriation of it the purchasers are protected against its consequences. (Id.)

HABEAS CORPUS.

VOLUNTARY CUSTODY—DISMISSAL OF PROCEEDINGS.—A proceeding by a prisoner under indictment to be discharged on *habeas corpus* from the custody of the sheriff will be dismissed if it appears upon the hearing that the alleged custody from which he seeks to be discharged was self-invoked and voluntary and submitted to only for the purpose of making a case on *habeas corpus*. (Ex Parte Schmitz, on *Habeas Corpus*, 663.)

See Criminal Law, 2-4.

HIGHWAYS. See Streets, Roads, and Highways.

HOMESTEAD. See Public Lands, 2, 3.

HUSBAND AND WIFE. See Divorce; Estates of Deceased Persons, 2-4.

ILLEGITIMATES. See Estates of Deceased Persons, 1-4.

INFANTS. See Guardian and Ward; Negligence, 33-35; Parent and Child.

INJUNCTION.

1. **PRELIMINARY INJUNCTION—POWER OF COURT TO MODIFY SUA SPONTE.**—It seems, on principle and authority, that the court which has granted a preliminary injunction *ex parte* which by its terms is to continue until further order of the court, may dissolve or modify it of its own motion whenever it becomes satisfied that the order was improvidently or erroneously made. (Wolf v. Board of Supervisors of Santa Clara County, 285.)
2. **CONSTRUCTION OF CODE—QUESTION NOT DETERMINED—POWER TO MODIFY UNDER STIPULATION.**—The question raised whether section 532 of the Code of Civil Procedure, providing for dissolution or modification of an *ex parte* injunction upon notice before trial, excludes the power of the court to act upon its motion, is not definitely determined, it being the clear effect of a stipulation upon the hearing of the case that "the entire matter should be submitted as a whole, pleadings, motions, orders, and the evidence." Thus

INJUNCTION (Continued).

the court has power to modify the injunction order after such submission before the final decision of the case. (Id.)

3. **FRAUDULENT DIVERSION OF BAKERS' BUSINESS—DAMAGE.**—Plaintiffs, whose bakery had been known as the "Old Homestead Bakery," and whose bread was stamped with the words "Old Homestead," the word "Old" being stamped above the word "Homestead," may enjoin the fraudulent diversion of their business by the defendant, who offered for sale bread stamped "New Homestead," of the same size and stamped in the same style as the loaves of the plaintiffs, with the fraudulent intent to injure and divert the business of plaintiffs, and to deceive and mislead their previous purchasers and customers, and which had that effect, to plaintiffs' damage, for which judgment was given. (*Banzhaf v. Chase*, 180.)
4. **GIST OF ACTION—TRADEMARK NOT INVOLVED—FRAUDULENT APPROPRIATION OF TRADE.**—The plaintiffs' right to recover in the action does not depend upon plaintiffs' right to the exclusive use of the words in question. The gist of the action is not the appropriation and use of another's trademark, but is based upon the fraudulent injury to and appropriation of another's trade. (Id.)

See Attorney and Client, 6; Certiorari; Deeds, 4, 5; Municipal Corporations, 11; Injunction, 5, 9; Park; Statute of Limitations, 4; Streets, Roads, and Highways, 5; Water and Water-Rights, 11.

INSANITY. See Criminal Law, 18-30.

INSOLVENCY. See Fraudulent Conveyance.

INSTRUCTION. See Contract, 9-12; Criminal Law, 8, 30; Negligence, 11-13, 17-22, 28-32.

INSURANCE.

1. **FIRE INSURANCE—REINSURANCE—SURRENDER OF COVERING NOTE AFTER LOSS—MISTAKE—RESCISSION.**—An insurance company which had reinsured against part of the risk on one of its policies, and after loss, at the request of the reinsuring company, and under mistake of fact as to the loss, surrendered the covering note of the company, is entitled to rescind the cancellation thereof on account of such mistake, and to recover against the reinsuring company the amount which was actually due therefrom when its covering note was cancelled. (*Traders Insurance Company v. Aachen and Munich Fire Insurance Company*, 370.)
2. **NATURE OF MISTAKE—UNCONSCIOUS IGNORANCE OF FACT—BELIEF IN NON-EXISTENT FACT.**—It is immaterial to the nature of the

INSURANCE (Continued).

mistake of fact, under sections 1576 and 1577 of the Civil Code, whether it be considered an "unconscious ignorance" of the fact of loss or a "belief" in the present existence of the property insured. (Id.)

3. **RECOVERY FOR MISTAKE NOT INEQUITABLE.**—The plaintiff may recover what it has parted with by mistake of fact, where its success would not render a recovery inequitable, nor subject the defendant to any loss which in equity and justice it ought not to suffer. (Id.)
4. **INTENT TO SURRENDER UNKNOWN CLAIM NOT IMPUTED—ABSENCE OF EXPRESS UNDERSTANDING.**—An intent to surrender an accrued claim, the existence of which was not known, should not be imputed to the plaintiff in the absence of evidence of an express understanding to that effect. (Id.)
5. **CLOSED TRANSACTIONS—SUBSEQUENT DEALING WITH ANOTHER COMPANY.**—Where the transactions between plaintiff and defendant company had been closed by the loss and the mistaken surrender of its covering note before the second reinsurance was effected in another company, the subsequent dealing by plaintiff with such other company, whatever may be its legal effect, could not destroy the rights thus vested in plaintiff against the defendant. (Id.)
6. **FIRE INSURANCE — LOSS BY SEVERAL COMPANIES — CONTRIBUTION — CONTRACT FOR ADJUSTMENT PRO RATA — MISTAKE — UNJUST PAYMENT—RELIEF IN EQUITY.**—Although in the absence of contract between several fire insurance companies whose policies require a *pro rata* payment of loss, the contracts are independent, and there is no contribution between them in case of payment of any excess by one or more, yet where several companies entered into an agreement to determine the amount of their loss, and to apportion it among themselves as their policies may require, and solely by reason of such agreement, in course of common adjustment, plaintiff companies were compelled, by mutual mistake of all the insurers, through their adjuster to pay all of the loss on specified machines insured by them, for which defendant companies, by the general terms of their policies, were liable *pro rata*, plaintiffs, upon discovery of the mistake, after such payment, were entitled, as parties to the contract, to be relieved in equity from the unjust and inequitable burden imposed upon them through such mistake. (Fireman's Fund Insurance Company v. Palatine Insurance Company, 252.)
7. **CONSTRUCTION OF POLICIES—PROPERTY COVERED.**—The several independent contracts of the plaintiff and defendant companies must be separately construed. The mere fact that the policies of plaintiffs were specially limited to "five type-setting machines with fixtures and appurtenances" contained in the building of the insured publishing company, and that they were not specifically mentioned in the policies of defendants, which covered "printing presses,

INSURANCE (Continued).

stereotyping machinery, and other fixed and movable machinery, implements, tools, furniture, and fixtures," contained in the same building, does not authorize the exclusion from defendants' policies of the type-setting machines, coming clearly within their general provisions concurrently with plaintiffs' policies, though covering other property not insured by plaintiffs. (Id.)

8. EFFECT OF PRO RATA CLAUSE, AND PAYMENT BY PLAINTIFFS.—

Under the *pro rata* clause contained in all the policies, each of the insurers, plaintiffs and defendants, was originally liable to the insured for such proportion of the loss on the type-setting machines as the amount of the insurance thereon bore to the whole of the insurance covering the same. Plaintiffs, therefore, in paying to the insured the whole amount of the loss on such machines paid not only the amounts for which they were liable under their policies but also the amounts for which defendants were liable under their policies. (Id.)

9. LIABILITY TO INSURED UNDER AGREEMENT—COMPULSORY PAYMENT.

—Under the terms of the agreement, the plaintiff companies when required to pay to the insured the whole amount of the insurance on the type-setting machines as the result of the agreed adjustment, would have no defense to an action against them by the insured based upon the adjustment and apportionment made which the insured had the right to accept and rely upon as a new agreement; and the plaintiff companies were therefore compelled to make such payment to the insured. (Id.)

10. FIRE INSURANCE—SEPARATE ITEMS INSURED—ENTIRETY OR SEVERABILITY OF CONTRACT—NATURE OF RISK.—Where several items are insured in a policy of insurance against loss by fire, the question of the entirety or severability of the contract depends upon the nature of the risk. Where the property is so situated that the risk on one item cannot be affected without affecting the risk on another item, the policy must be regarded as entire; but where the property is so situated that the risk on each item is separate and distinct from the risk on the others, the policy must be regarded as severable. (Goorberg v. The Western Assurance Company, 510.)

11. QUESTION OF INTENTION.—Whether a contract of fire insurance is entire or severable is a question of intention, to be determined from the language employed by the parties, viewed in the light of the circumstances surrounding them at the time they contracted. (Id.)

12. CONDITIONS AVOIDING POLICY—CONSTRUCTION AGAINST INSURER.—

Where the policy insuring several classes of property provides that it shall be void in certain events in view of the settled rule that any uncertainty or ambiguity in a contract of insurance is to be interpreted most strongly against the insurer, this language should not be given the effect of avoiding the contract as to every item insured in all cases. (Id.)

INSURANCE (Continued).

13. **BREACH OF CONDITION AS TO ONE ITEM — ENTIRETY OF PREMIUM NOT CONCLUSIVE—PROTECTION OF INSURER.**—Where the nature of the risk makes the contract severable, the mere fact that the premium is entire should not affect the conclusion of severability, because of a breach of conditions as to one item. On the other hand, where the breach of conditions, although in terms affecting only one item, is such as to increase the hazard to which other items are subjected, the avoiding of the policy as to all such items is the very thing which is requisite to protect the insurer from having to assume a greater risk than he contracted for. (Id.)
14. **MISREPRESENTATION AS TO TITLE — “SQUATTER’S POSSESSION—SEPARATE INSURANCE OF HOUSE AND FURNITURE—ENTIRE CONTRACT.**—Where there were separate items of furniture in a house also insured, and there was a misrepresentation as to title to the land, by reason of the house being on a mere “squatter’s” possession of government land, the risk of insurance on the furniture is affected by the risk on the house coupled with it, which latter risk is greater than it would have been if he owned the land, and the contract of insurance of the house and furniture must, so far as concerns the representation as to title, be treated as entire. (Id.)
15. **DISCOVERY OF FACTS AFTER FIRE—RETENTION OF PREMIUMS—DEFENSE NOT WAIVED.**—The fact that the insurance company discovered the true state of the title shortly after the fire, and afterwards retained the premium, cannot affect its right to defend on the misrepresentation as to title. The company was not bound to rescind the contract in order to defend under its terms against its liability thereupon for such misrepresentation; nor could the retention of the premium after the loss constitute any waiver or estoppel on the part of the insurance company against such defense. (Id.)
16. **WAIVER OR ESTOPPEL AFTER LOSS—ESSENTIAL FACTS—RELIANCE—CHANGE OF POSITION—INJURY.**—To constitute a waiver or estoppel by the action or non-action of the insurer after the loss, it is essential that the insured party should have relied upon the conduct of the insurer, and been induced by it to put himself in such a position that he would be injured if the insurer were allowed to repudiate its action. (Id.)
17. **PLEADING — WAIVER — FACTS CONSTITUTING ESTOPPEL.**—Where the complaint showed affirmatively the breach of warranty as to title, and, to overcome this, alleged the issuance of the policy by the defendant after notice of the defect of title, but did put in issue the retention of premium after knowledge of the defect, he cannot rely thereupon. If the plaintiff relies upon any facts constituting a waiver or estoppel as to any defense which would otherwise be available under the facts stated in the complaint, the facts constituting such waiver or estoppel must be pleaded in the first instance. (Id.)

INSURANCE (Continued).

18. **FIRE INSURANCE—CHANGE OF INTEREST—OPTION TO PURCHASE NOT EXERCISED.**—A mere option given to a third party to purchase which is not exercised by payment of the purchase money does not create a change of interest in the property insured against fire within the meaning of the fire-insurance policy, avoiding it for a change of interest. (*Mackintosh v. Agricultural Fire Insurance Company*, 440.)
19. **CONSTRUCTION OF POLICY—LOSS AND RISK NOT CHANGED.**—The change of interest referred to in the policy, in view of the well-known rule of construction, that policies are to be construed most strongly against the insurer, refers to some change of interest, which would make the loss in case of destruction fall upon the buyer, and cause the insurer to lose his interest in protecting the property from fire, and not as referring to a mere option to purchase, which does not change the risk in case of loss. (Id.)
20. **QUALIFIED POSSESSION TO TEST PROPERTY INSURED—CHANGE NOT EFFECTED—COMMON POSSESSION.**—Where the person holding the option to purchase mining property insured had only a qualified possession, for the purpose of operating a smelter thereon to test slag and ore, under an agreement that during such testing the insured giver of the option or his agent "shall have full access to said property and its management, in every respect the same as though to all intents and purposes the work was being done by him," and it appears that the insured kept a watchman on the premises, who was holding for him, such common possession did not work the change of possession which would avoid the policy. (Id.)
21. **INCREASED HAZARD—SMELTING FURNACE—PERMISSION BY GENERAL AGENTS—INCREASED PREMIUM—INSUFFICIENT INDORSEMENT—WAIVER—ESTOPPEL.**—Where an increased hazard from a smelting furnace was permitted by the general agents of the insurance company, with full knowledge of the facts, for an increased premium, who agreed to indorse the same upon the policy, but made an insufficient indorsement, owing to an erroneous description of the smelter as being in the policy, the case must be considered as if the agreement was not indorsed upon the policy under the law as to waiver and estoppel created by the conduct of general agents authorized to make contracts. (Id.)
22. **STIPULATION AGAINST WAIVER OR PERMISSION NOT INDORSED—WAIVER BY CONDUCT.**—Stipulations in a policy against waiver or permission not indorsed do not preclude a waiver by the conduct of authorized agents in regard to future operations of the company, nor prevent the insured from relying on an oral contract by such agents to make an indorsement not effectively made. (Id.)
23. **FAILURE TO DESCRIBE SMELTER IN INDORSEMENT—ESTOPPEL.**—The failure of the general agents of the company to accurately describe the smelter in the slip attached to the policy setting forth the permission for the additional premium, was the fault of the company,

INSURANCE (Continued).

and any attempt on its part to avoid the policy because of such failure would at once create an estoppel which would prevent the company from taking advantage of it. (Id.)

24. **POWER OF GENERAL AGENTS TO WAIVE FORFEITURES—ORAL WAIVER CONSTITUTING NEW CONTRACT.**—General agents authorized to issue and deliver new policies are regarded as having the same power to waive conditions and forfeitures as the companies themselves. The limitations embodied in the stipulation do not prevent them from making new contracts; and waivers constituting a new contract upon sufficient consideration need not be evidenced by writing nor indorsed upon the policy, if made by a general agent having power to make the contract, no matter what limitations or conditions may be expressed in the policy. (Id.)
25. **DUTY TO HAVE WATCHMAN—WORKS NOT IDLE—CUSTOMARY OPERATION—PRESUMPTION.**—A clause in the policy making it the duty to keep a watchman day and night when the works are idle does not apply where the works are operated daily during usual and customary hours. There is no evidence that it was usual or customary to operate such works at night, and the presumption is to the contrary, and in the absence of such evidence on the part of the defendant it must be concluded that the policy did not require a watchman at night when the works were in operation during the day; and the fact that one was employed and failed to watch did not affect the validity of the policy. (Id.)
26. **FORFEITURE NOT FAVORED—SUBSTANTIAL OPERATION OF PART OF WORKS.**—Forfeitures are not favored in law. It was not necessary that the whole works should be kept in operation or that all of the furnaces should be kept going every day. A substantial operation of the works is all that is required. (Id.)
27. **FIRE INSURANCE—DECISION AFFIRMED.**—The decision in case No. 3498, *ante*, p. 440, is affirmed and applied to similar facts in this case. (*Mackintosh v. American Fire Insurance Company*, 453.)
28. **PROVISION FOR EMPLOYMENT OF WATCHMAN—DIFFERENCE IN PHRASEOLOGY IMMATERIAL.**—*Held*, that the difference in phraseology of the clause relating to the employment of watchmen when the works were idle has no different effect from the clause considered in the case above referred to. (Id.)
- MUTUAL LIFE INSURANCE COMPANY—GUARANTEE FUND—NOTES PAYABLE AFTER ACTUAL DEMAND—STATUTE OF LIMITATIONS.**—A note given to a mutual life-insurance company incorporated under the act of April 2, 1866, as part of the guarantee fund required by that act, and which by the statute was not intended to be renewed every four years, and by its terms was payable to the order of the insurance company "within five days after actual demand, with interest at the then legal rate from and after such demand," the obligation of which has never been discharged, is not subject to the operation

INSURANCE (Continued).

- of the statute of limitations prior to the making of actual demand for payment by the lawful holder thereof. (*Neale v. Morrow*, 414.)
30. **CONSTRUCTION OF NOTE—MEANING OF WORDS—OBJECT AND CIRCUMSTANCES—STATUTE MADE PART OF IT.**—Every word used in the note is to be given its full meaning and effect; and in ascertaining its meaning the object in view and the circumstances attending its execution are to be considered. The note having been given pursuant to the act under which the insurance company was organized, its provisions, in so far as they bear upon such note, must be considered as written into the note itself. (*Id.*)
31. **TIME OF DEMAND FIXED BY ACT—CONTINUING GUARANTEE FUND.**—The act of incorporation, which is equal in dignity with the statute of limitations, limits the time within which a demand may be made for the payment of a guarantee note to the period before a fixed capital is obtained by the company, it being intended that such notes shall constitute a continuing guarantee fund, which was to remain intact for the protection of policy-holders and other creditors of the company until a fixed capital should be acquired, when the guarantee notes were to be surrendered. (*Id.*)
32. **NOTES PAYABLE AT OPTION OF COMPANY—EXCLUSION OF PRESUMED DEMAND.**—Since the Insurance Act required the notes to be payable at the option of the company, and to be negotiable, it was proper, and in accordance with the intent of the act, that the notes should negative any presumption of a demand against the company or its indorsee by making each payable only after an actual demand. (*Id.*)

See Agency.

INTEREST. See Dupont-Street Bonds, 4; Taxation, 15.

JUDGES. See Bill of Exceptions, 2, 3.

JUDGMENT. See Appeal, 3, 4; Corporations, 15-18; Divorce, 5-10; Dupont-Street Bonds, 1, 4, 6, 8; Estates of Deceased Persons, 14, 15, 17; Nuisance, 3; Parent and Child, 1; Pleading, 4.

JURISDICTION. See Attorney and Client, 6, 7; Corporations, 11; Divorce, 1-6; Guardian and Ward, 3, 4; State Lands.

JURY AND JURORS. See Criminal Law, 1, 8, 15, 30.

LACHES. See Divorce, 9; Mistake, 4, 15.

LAND. See Public Lands; State Lands; Title to Land.

LANDLORD AND TENANT. See Ejectment, 1; Negligence, 1-3.
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LEASE. See Mistake, 18; Landlord and Tenant.

LIBRARY. See Park.

LIENS. See Mechanics' Liens.

LIFE INSURANCE. See Insurance, 29-32.

LOS ANGELES. See Streets, Roads, and Highways, 2.

MANDAMUS.

CONTINUANCE FOR SICKNESS OF PARTY—DISCRETION OF COURT.—A writ of mandate will not lie to control the discretion of the court in refusing a continuance, notwithstanding the sickness of a party preventing his attendance on the court. Such sickness does not *ipso facto* require the court to grant the application. It is for the trial court in all cases, except where otherwise expressly provided by statute, to determine whether or not the circumstances shown upon an application are such as to make it proper that a continuance should be granted, and its conclusion thereon will not be disturbed unless there has been a plain abuse of discretion. (Lynch v. Superior Court of the City and County of San Francisco, 123.)

See Dupont-Street Bonds, 2.

MASTER AND SERVANT. See Negligence, 4-11.

MEASURE OF DAMAGES. See Damages.

MECHANICS' LIENS.

1. PRIORITY BETWEEN LIENORS—CONSTITUTIONAL LAW—LABORERS NOT ENTITLED TO PRIORITY OVER MATERIALMEN.—Section 1194 of the Code of Civil Procedure, providing for a priority of liens against property: First, to all persons performing manual labor in, on, or about the same; second, to persons furnishing materials; third, to subcontractors; and fourth, to original contractors, does not violate section 15 of article XX of the constitution, providing that "Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the legislature shall provide by law for the speedy and efficient enforcement of such liens," in so far as it prefers the laborers and materialmen to contractors and subcontractors. That section is unconstitutional in so far as it attempts to give a priority to persons performing manual labor over persons furnishing materials. (Miltimore v. Nofziger Brothers Lumber Company, 790.)

MECHANICS' LIENS (Continued).

2. **CONSTITUTIONAL PROVISION CONFERRING LIEN SELF-EXECUTING.**—Section 15 of article XX of the constitution is self-executing to the extent that it confers upon the classes of persons enumerated therein a lien, and makes them equal, in point of rank, with regard to each other. (Id.)
3. **'FORECLOSURE—STATUTORY PROVISION FOR ATTORNEY'S FEES UNCONSTITUTIONAL.**—The provision of the statute purporting to authorize the allowance of attorney's fees for the plaintiff in an action for the foreclosure of mechanics' liens is unconstitutional and void. (Union Lumber Company v. Simon, 751.)
4. **SUFFICIENCY OF NOTICE OF LIEN.**—A notice of mechanic's lien, sufficient as to the owner, cannot be void as to third persons without knowledge of the extrinsic facts. (Id.)
5. **DESCRIPTION OF LAND TO BE CHARGED WITH LIEN—EVIDENCE OF IDENTITY.**—In a notice of a claim for a mechanic's lien, the description of the property to be charged with the lien need only be such as will be "sufficient for identification," and in an action to enforce the lien evidence may be received for the purpose of determining its sufficiency, and to identify the land sought to be charged with the land described in the notice. (Id.)
6. **IMPERFECT DESCRIPTION BY METES AND BOUNDS—GENERAL DESCRIPTION.**—In a notice of a claim for a mechanic's lien, an imperfect attempt to describe the land sought to be charged by metes and bounds may be aided and rendered sufficient by a further statement in the notice that a particular person is the owner of the land, and the building erected thereon, and that the lien is claimed for materials furnished a specified contractor while such contractor was engaged in constructing the building for such owner; and in an action to enforce the lien, evidence is admissible to identify the land described in the complaint with the land so described in the notice. (Id.)
7. **FINDING — LAND NECESSARY FOR CONVENIENT USE OF BUILDING.**—In such an action, a finding that the building covered a large portion of the land, and that all of the land, which had a frontage of one hundred and six feet and eight inches, and a depth of one hundred and sixty-four feet and one inch, was necessary for its convenient use and occupation, is sustained by evidence showing that the building was constructed for a hospital, having a dimension of sixty-eight feet in width and one hundred and eight feet in depth, containing "40 bedrooms for patients, and also operating-rooms, sterilizing-room, washrooms, bathrooms, nurses' dormitories, dining-rooms, and nurses' classrooms," although there was no evidence showing the particular portion of the lot upon which the building stood. From such evidence the court could determine, as a matter of general knowledge, that the entire lot was necessary for the use of the hospital. (Id.)

MECHANICS' LIENS (Continued).

8. **CONSOLIDATION OF ACTIONS—ISSUE TENDERED BY ONE PLAINTIFF—FINDING.**—Upon the consolidation of several actions to foreclose mechanics' liens, there is only a single action by the respective plaintiffs against the defendants, and the decision thereon is to be made as if the cause of action had been presented in a single complaint, and is to be embodied in a single set of findings, in which all facts in issue in the consolidated action are to be incorporated; and an issue as to the amount of the land necessary for the convenient use and occupation of the building, tendered in any of the original complaints, and the findings and judgment thereon, operate in favor of all of the plaintiffs in the same manner as if they had originally joined as plaintiffs in bringing the action and raising such issue. (Id.)
9. **ACTION BY SUB-CONTRACTORS—PERSONAL JUDGMENT AGAINST OWNERS.**—In an action by sub-contractors to enforce liens for material and labor furnished by them to the contractor for the construction of a building, they are entitled only to enforce their claims against the land; and a personal judgment against the owners is erroneous. (*Builders' Supply Depot v. O'Connor*, 265.)
10. **DELAY IN PERFORMANCE OF CONTRACT—DEDUCTION OF DAMAGES BY OWNERS AGAINST LIEN-HOLDERS.**—Where the contract was valid and properly recorded, and the rights of all parties rest upon it, and it provided for the allowance of damages to the owners for delay if the building was not finished in five months, the damages proved by the owners to have resulted from such delay should be deducted from the contract price as against lien-holders. (Id.)
11. **CONSTRUCTION OF CODE—PROVISION AGAINST OFFSETS.**—The provisions of section 1184 of the Code of Civil Procedure against the diminution of the contract price as to all liens except the contractor's by any indebtedness, offset, or counterclaims in favor of the owners against the contractor, has reference to offsets not arising under the terms of the contract, and as to which from an inspection of the contract, materialmen and laborers could have no notice. (Id.)
12. **ATTORNEYS' FEES—UNCONSTITUTIONAL PROVISION.**—The provision for attorneys' fees in favor of the plaintiff in mechanics' lien suits, made in section 1195 of the Code of Civil Procedure, in favor of each lien claimant whose lien is established, without any allowance to the defendant, and without like allowance in other cases, is in violation of the fourteenth amendment to the federal constitution, and of the provisions of the state constitution requiring that general laws shall be uniform, prohibiting special laws, and declaring the "inalienable rights of all men to acquire, possess, and protect property." (Id.)
13. **COSTS—EXPENSE OF FILING LIENS.**—The expense of filing liens is properly included as part of the "costs and disbursements" upon

MECHANICS' LIENS (Continued).

foreclosure thereof; and the provision of the code for the allowance of such expense as part of the costs is not unconstitutional. (Id.)

MISTAKE.

1. **DEED OF TRUST—REFORMATION OF DESCRIPTION OF PROPERTY—OUTLAWED NOTE.**—Where the property secured by a deed of trust located the property described in the wrong county, an action may be commenced in the county in which the property deeded was in fact located, to have the deed reformed, notwithstanding the note secured thereby was barred by the statute of limitations when such action was brought. (*Travelli v. Bowman*, 587.)
2. **EFFECT OF DEED OF TRUST—TITLE IN TRUSTEE—POWER TO SELL FOR OUTLAWED DEBT.**—A deed of trust to secure a debt is not a mortgage, but passes the legal title to the trustee, for the purposes of the trust which remains in him until the debt is paid or a sale is made of the premises under the deed; and the fact that the debt secured is outlawed does not affect the title of the trustee, or his power to sell to pay the debt. (Id.)
3. **EFFECT OF REFORMATION OF DEED.**—The reformation of the deed so as correctly to describe the property secured is not to do a vain thing, but to perfect a valuable right to property in the trustee for the purposes of the trust. (Id.)
4. **LACHES—DISCOVERY OF MISTAKE.**—Laches is not imputable to the creditor or the trustee, where they had no knowledge of the mutual mistake in the description of the property until about one month prior to the commencement of the action to reform the deed. (Id.)
5. **IGNORANCE OF TRUSTEE—FAILURE TO EXAMINE DEED.**—The fact that the trustee, who did not know that the trust-deed was among his papers, did not examine the deed so as to discover the mistake, is not evidence of any laches that would defeat the action to reform the deed. The mere failure of the grantee to read the instrument with sufficient attention to perceive the error or defect in its contents will not prevent its reformation at his suit. (Id.)
6. **DECREE OF DISTRIBUTION—RELIEF IN EQUITY—FRAUD OR MISTAKE—ENFORCEMENT OF TRUST.**—A decree of distribution of the estate of a deceased person is subject to review in equity upon a showing that it was procured by extrinsic fraud or mistake, whereby the court and the losing party were imposed upon or misled; and an involuntary trust may be enforced against the parties who have thereby obtained an inequitable advantage. (*Bacon v. Bacon*, 477.)
7. **EQUITY JURISDICTION NOT AFFECTED BY CONCLUSIVENESS OF DECREE—POWER OF LEGISLATURE—CONSTRUCTION OF CODE.**—It is not within the power of the legislature to divest the jurisdiction in equity cases conferred by the former constitution upon the district court, and by the present constitution upon the superior court as

MISTAKE (Continued).

succeeding to the equity jurisdiction of the district court, and that jurisdiction could not be divested or affected by section 1666 of the Code of Civil Procedure, making the decree of distribution conclusive as to the rights of heirs, legatees, or devisees. That section should be construed so as to make it constitutional, if reasonably possible; and it may be reasonably interpreted to mean that it should have merely the same force and effect as other final judgments, which are subject to any form of direct attack allowed by law or by independent suit in equity. (Id.)

8. **DIRECT ATTACK IN EQUITY.**—A suit in equity to review a judgment for fraud or mistake is a direct proceeding against the judgment, and not a collateral attack. (Id.)
9. **REMEDY BY MOTION NOT EXCLUSIVE.**—The remedy by motion, under section 473 of the Code of Civil Procedure, within six months after judgment, to be relieved therefrom, when taken against the moving party, through his mistake, surprise, or excusable neglect, though it may include mistake superinduced by fraud of the other party, is merely cumulative, and does not exclude or displace the remedy in equity, nor is it an adequate substitute therefor. (Id.)
10. **EQUITABLE RELIEF INCLUSIVE OF MISTAKE.**—The power of a court of equity to relieve against judgments is not confined to cases where they have been procured by fraud, but extends also to judgments wrongfully given by reason of mistake either of the court or of the injured party unmixed with fraud, and not the result of the negligence of the injured party. (Id.)
11. **MISTAKE IN LEGACY DISTRIBUTED—INCORRECT COPIES OF WILL—RELIEF IN EQUITY—TRUST.**—Where the probated will in fact gave to plaintiff a legacy of ten thousand dollars, but by mistake of a copyist of the will typewritten copies thereof were furnished in which "ten" was mistaken for "two," and the will was represented to all parties and to the court as giving a legacy of only two thousand dollars, and through said mistake, unmixed with negligence of the plaintiff, a legacy of two thousand dollars only was distributed to plaintiff, and the remaining eight thousand went to the residuary legatees, plaintiff may enforce a trust against them and those in interest in the stock of a corporation organized to take their residuary estate. (Id.)
12. **RELiance UPON STATEMENTS OF PERSONS IN FIDUCIARY RELATIONS.**—Where the plaintiff, relying upon the statement of her husband and of the executors, who were also residuary legatees, that the legacy to her was in the sum of two thousand dollars, failed to appear at the distribution, her reliance upon the statements of those who then stood in fiduciary relations to her could not be charged to her as negligence. (Id.)
13. **TRUST RELATIONS OF EXECUTORS.**—Executors occupy trust relations toward the legatees, and are bound to the utmost good faith in their transactions with the beneficiary. (Id.)

MISTAKE (Continued).

14. **EXTRINSIC FRAUD OR MISTAKE—GRAVAMEN OF RULE—ADJUDICATION OF TECHNICAL ISSUE.**—The gravamen of the rule as to extrinsic fraud or mistake lies in the fact that thereby "the unsuccessful party has been prevented from exhibiting fully his case," and consequently that there has been "no adversary trial or decision of the issue," or "no fair submission of the controversy." Where the unsuccessful party has been thus hindered, he is not to be refused relief on the ground that the fact on which his defense or claim in the original action depended, and by which he expects to bring about a different result in the new suit for equitable relief, was technically in issue in the original action or proceeding, or was necessarily decided by the court in that action, and concluded by the judgment beyond reach on collateral inquiry. (Id.)
15. **LACHES NOT SHOWN—STATUTE OF LIMITATIONS—DISCOVERY OF MISTAKE.**—Where no independent laches was shown, which could have prejudiced the defendants, and nothing appears to have put the plaintiff upon inquiry prior to the actual discovery of the mistake, the statute of limitations only began to run from the time of such discovery. (Id.)
16. **EVIDENCE—INTRODUCTION OF ORIGINAL WILL TO SHOW MISTAKE.**—In the suit in equity which involves a direct attack upon the judgment on the ground of the mistake, the original will was properly introduced in evidence to establish the mistake and the right of the plaintiff, and to show the injury resulting to her from the erroneous distribution. (Id.)
17. **DECREE OF DISTRIBUTION—RELIEF IN EQUITY—MISTAKE IN AMOUNT OF LEGACY—TRUST—SUPPORT OF FINDING AGAINST NEGLIGENCE.**—In this action in equity to enforce a trust against residuary legatees and their interest in a corporation organized by them to take their residuary interest under a decree of distribution, on the ground of mistake in the decree to the injury of plaintiff, under the same facts shown in case No. 3741, *ante*, p. 477, with additional facts tending to show some degree of negligence on the part of plaintiff in failing to discover the mistake prior to the decree, but not so marked or inexcusable as to overcome the implied finding of the court to the contrary, or to show that the opposing parties were thereby prejudiced, the decision of the court in favor of the plaintiff will be affirmed. (*Soule v. Bacon*, 495.)
18. **LEASE—OPTION TO PURCHASE—CONSTRUCTION—EXCLUSION OF EXCEPTED AREA—EASEMENT.**—A lease by a railroad company of land for salt works, saving and reserving from the leased premises its railroad track and a space twenty feet in width on either side of the center of the track, and granting an option to purchase the leased premises for a fixed price, does not include within said option any part of the excepted area, and such exception cannot be construed to be merely the reservation of an easement over a part of the leased premises. (*Los Angeles and Redondo Railroad Company v. New Liverpool Salt Company*, 21.)

MISTAKE (Continued).

19. **MISTAKE IN DEED—REFORMATION—PLEADING AND PROOF.**—Where, by mistake in the deed executed under the option, the excepted area was included therein, it is immaterial whether the mistake was mutual or a mistake of the plaintiff, known or suspected by the defendant; and where the mistake was alleged in each form, the plaintiff was entitled to reformation of the deed upon sufficient proof of either. (Id.)
20. **CARELESSNESS IN FAILING TO READ DEED.**—The mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly. Such carelessness does not constitute a neglect of legal duty, within the meaning of section 1577 of the Civil Code; and the conditions on which the contract may be reformed, specified in section 3399 of the Civil Code, do not require the refusal of relief because the party asking it might have discovered the mistake before signing. (Id.)

See Ejectment, 5; Insurance, 1-6.

MORTGAGE.

1. **FORECLOSURE OF MORTGAGE—MENTAL INCAPACITY OF MORTGAGOR—FINDINGS—RESCISSION NECESSARY.**—In an action to foreclose a mortgage, where the court expressly finds that when the note and mortgage were executed the mortgagor was of unsound mind but not entirely without understanding, nor had her incapacity been judicially determined, the findings show a case where rescission is necessary under the terms of section 39 of the Civil Code. (*Jacks v. Deering*, 272.)
2. **DECISION UPON FORMER APPEAL—INFERENCES FROM DIFFERENT FINDINGS—VOID CONTRACT—LAW OF CASE INAPPLICABLE.**—A decision on a former appeal based upon inferences from different findings, that it was intended to find a case of general mental incapacity, entirely without understanding, making the mortgage a void contract within section 38 of the Civil Code, is not the law of the case upon the present appeal, based upon express findings to the contrary of such inferences. (Id.)
3. **HARMONY OF FINDINGS REQUIRING RESCISSION—CONJUNCTIVE FINDING.**—A conjunctive finding that the mortgagor did not have sufficient mental capacity to understand "the nature, purpose, and effect of the transaction," is consistent with the finding that she was not entirely without understanding when the note and mortgage were executed. It is consistent with a partial or full understanding of its nature and purpose, and with an imperfect understanding of the nature, purpose, and effect. The case, therefore, clearly falls within section 39 of the Civil Code, requiring a rescission. (Id.)

MORTGAGE (Continued).

4. **FINDING AGAINST RESCISSION — GOOD FAITH OF MORTGAGEE — AFFIRMANCE OF FORECLOSURE.**—Where the court found that no rescission was ever effected or attempted, though the attorney for the mortgagor, who became her administrator, had full knowledge of the transaction; and where it clearly appears that the mortgagee parted with full value for the mortgage in good faith, and in ignorance of the mortgagor's condition, and that it was represented to him that she was fully capable of transacting business,—a judgment foreclosing the mortgage will be affirmed. (Id.)
5. **FORECLOSURE OF MORTGAGE—PARTIES.**—One not made a party to an action to the foreclosure of a mortgage who has any interest in the premises is not affected by the foreclosure decree. (*Hibernia Savings and Loan Society v. Robinson*, 140.)
6. **WRIT OF ASSISTANCE—TITLE NOT TRIABLE—ACTION.**—The title of one not a party to the foreclosure suit is not triable upon a proceeding for a writ of assistance in favor of the purchaser at the foreclosure sale; but it can only be determined in an appropriate action brought for that purpose. (Id.)
7. **PROTECTION OF POSSESSION — MOTION TO RESTRAIN WRIT.**—If a person claiming title who was not a party to the foreclosure suit is in actual possession of the property sold, such possession may be protected upon motion to restrain the execution of the writ of assistance in favor of the purchaser. (Id.)
8. **QUESTION OF FACT — SUPPORT OF FINDING — RIGHTS OF ESTATE UNAFFECTED BY WRIT.**—The right to be protected upon a motion to restrain the execution of the writ depends upon the claimant being in possession, which is a question of fact to be determined by the trial court; and where the evidence sustains a finding that the administrator of a deceased claimant never had been in the possession of the premises by tenant or otherwise, the rights of the estate cannot in any degree be affected by the writ, and must be otherwise determined. (Id.)

See *Guardian and Ward*, 5-10; *Parties*; *Pawnbrokers*, 3.

MUNICIPAL CORPORATIONS.

1. **FREEHOLDERS' CHARTER—INITIATIVE AND REFERENDUM—CONSTITUTIONAL LAW—REPUBLICAN FORM OF GOVERNMENT.**—A freeholders' charter of a municipal corporation framed and adopted under the provisions of section 8 of article XI of the constitution, and approved by the legislature, may incorporate the procedure known as the "initiative and referendum," so as to authorize the majority of the electors at the ballot-box to participate directly in the enactment of local laws; and such procedure is not in violation of any provision of the state constitution, nor of the provision of section 4 of article IV of the constitution of the United States, providing that "The United States shall guarantee to every state

MUNICIPAL CORPORATIONS (Continued).

in this Union a republican form of government." That section does not prohibit the direct exercise of legislative power by the people of a subdivision of the state in strictly local affairs. (In *Re Pfahler*, 71.)

2. **PRACTICAL CONSTRUCTION OF FEDERAL PROVISION.**—The provision of the federal constitution guaranteeing a republican government to each state in the Union was manifestly intended to apply only to the state as a whole. It was framed and adopted with full knowledge that a system of local government in town meetings obtained in some of the states; and that system was continued under the constitution, without any question as to its validity, and it is still found not only in several of the New England states, but also in other states. There are besides numerous other instances of the direct exercise of legislative power by the people in local affairs, authorized by the state. (Id.)
3. **QUESTION OF STATE POLICY.**—It is a question of local policy with each state to determine what its political subdivisions shall be, and what shall be the extent and character of their powers, and the manner of their exercise, and to what extent the people of a municipality shall be allowed to participate directly in the governmental function of legislation therefor. In the determination of those questions the entire body politic known as the state has absolute power, and the courts have nothing to do with that question of policy. (Id.)
4. **GRANT OF LOCAL POLICE POWER BY CONSTITUTION—MODE OF EXERCISE.**—Section 11 of article XI of the constitution of this state, providing that "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws," while it grants a local police power, grants it to the body politic and not to the city council as such, and does not determine the mode of the exercise of such power. The matter is left to the determination of the city or town, in accordance with the provisions of its charter. (Id.)
5. **DELEGATION OF LEGISLATIVE POWER TO MUNICIPALITIES.**—As to such local legislation as may not be included in the constitutional grant, the creation of municipalities, with power to exercise local self-government is not a forbidden delegation of legislative power, it being within the constitutional power of the legislature to provide for municipal corporations, and the approval by the legislature of a freeholders' charter delegating legislative power to the city is expressly authorized by the constitution. (Id.)
6. **EXPENSE OF ELECTION — INDEBTEDNESS OF CITY — PRESUMPTION.**—The objection that the expense of an election may prevent the proper exercise of the police power, by making the city indebtedness thereby incurred in excess of the provision of section 18 of

MUNICIPAL CORPORATIONS (Continued).

article XI of the state constitution, is not tenable. It must be presumed that the municipality will provide the funds necessary for the administration of its government. (Id.)

7. **DELEGATION OF POWER TO SPECIAL COMMISSION.**—The initiative and referendum by the people is not within the provision of section 13 of article XI of the constitution prohibiting the delegation of power to "a special commission" to perform any "municipal functions." The aggregate body of qualified electors cannot, under our constitution, be held to be "a special commission" within the meaning of that provision. (Id.)
8. **FREEHOLDERS' CHARTER NOT AFFECTED BY MUNICIPAL CORPORATION ACT.**—The fact that the initiative and referendum conferred in a freeholders' charter is not conferred in the General Municipal Corporation Act does not affect its validity. As to municipal affairs, it is sufficient that a charter is consistent with the constitution. The provision of the constitution for a freeholders' charter is distinct from the grant of power under the Municipal Corporation Act, and cannot be affected by its provisions. (Id.)
9. **USE OF WORDS "LEGISLATIVE AUTHORITY."**—The use of the words "legislative authority" in section 8 of article XI as to proposed amendments to freeholders' charters, was not intended to define the powers of that body or place it in a position where it would be beyond restrictions by the organic law of the city. (Id.)
10. **TITLE OF ACT APPROVING AMENDMENTS TO FREEHOLDERS' CHARTER.**—Where an initiative amendment was one of thirteen proposed amendments to the charter of the city ratified by its electors, the approval of the amendments as a whole by a resolution the title of which stated it was a resolution "approving thirteen certain amendments to the charter of Los Angeles," etc., was not in violation of the requirement that every act shall embrace but one subject which shall be expressed in its title. The method pursued was strictly in accord with the provision of section 8 of article XI of the constitution. (Id.)
11. **STREET-RAILROAD FRANCHISES — CONSTRUCTION OF ACT REQUIRING ORDINANCE—MAYOR'S VETO—INJUNCTION BY CITY.**—The act of March 3, 1903, amending the act of March 11, 1901, so as to provide that after the sale of a municipal franchise for a street railroad, and the filing of the bond by the successful bidder, "the franchise shall by said governing or legislative body be granted by ordinance," etc., is to be construed with the freeholders' charter of a city, requiring all ordinances to be approved by the mayor, or to be passed over his veto; and where an ordinance granting such franchise was vetoed by the mayor, and was not passed over his veto, and the money bid was tendered back, the city was entitled to enjoin the construction of the street railroad. (City of Los Angeles v. Davidson, 59.)

See Counties; Dupont-Street Bonds; Park; Road District.

MURDER AND MANSLAUGHTER. See Criminal Law, 12-30.

NEGLIGENCE.

1. **INJURY FROM WIRE ROPE—OBVIOUS DANGER—ASSUMPTION OF RISK BY TENANT—LANDLORD NOT RESPONSIBLE.**—Where premises were leased with full knowledge by the tenant, and without warranty by the landlord, concerning an obvious danger from a wire rope imbedded in the earth on the lot, which supported a telegraph-pole forming part of the landlord's electric system, which rope was not part of the leased premises, and where the tenant had lived thereon sixteen months before injury resulted to the tenant's wife from a fall upon the rope, the tenant and his wife had assumed all risk from such obvious danger; and no actionable negligence is imputable to the landlord in maintaining the wire rope, nor is he responsible for such resulting injury. (*Hatch v. McCloud River Lumber Company*, 41.)
2. **LATENT DANGER FROM SHARP POINTS—CONTRIBUTORY NEGLIGENCE.**—Conceding, without deciding, that the landlord was guilty of negligence in allowing sharp points of wire near the ground at the end of the wire rope to remain without protection or guard, where it appears that the wife's fall upon the wire and her resulting injury upon the sharp points were the consequence of her own contributory negligence in coming in contact with the exposed wire, the case is one where her contributory negligence in part caused her injury, and there can be no recovery for any negligence of the defendant contributing thereto. (*Id.*)
3. **INSUFFICIENT PLEADING — INCONSISTENT AVERMENT OF CARE.**—The complaint by the tenant and his wife against the landlord, which alleges facts negating the actionable negligence of the landlord in maintaining the wire rope and facts showing her own contributory negligence, is insufficient; and it is not sustainable by reason of an allegation that she was using all due care to avoid the wire, which is incompatible with the averment of her familiarity with its position and with the absence of any averment of extraordinary circumstances making it necessary for her to come in contact with it. (*Id.*)
4. **INEXPERIENCED SERVANT—EMPLOYMENT UPON DANGEROUS MACHINERY—DUTY OF EMPLOYER TO INSTRUCT.**—When one who is known to be an inexperienced person is put to work upon machinery which is dangerous to operate unless with care, and by one familiar with its structure, the employer is bound to give him such instructions as will cause him fully to understand and appreciate the danger attending the employment, and the necessity for care; and it is a breach of duty on the part of the employer to expose an inexperienced servant, even with his own consent, to such danger without giving him any instructions or cautions. (*Jenson v. Will & Finck Company*, 398.)

NEGLIGENCE (Continued).

5. **INJURY TO SMALL BOY—CHANGE OF EMPLOYMENT—FAILURE TO WARN—SUPPORT OF VERDICT.**—A verdict for damages for injury to a small boy is supported by evidence that he was regularly employed as cash-boy in a store, and was taken therefrom and put, without any warning or instruction, to dangerous work, of which he had no experience or knowledge, in removing large loaded trucks of merchandise from a basement to the sidewalk, on a rickety and uneven elevator without sides to protect his leg from being thrust between the elevator and sidewalk by a sudden movement of the truck, which occupied almost the entire floor space of the elevator, and was liable to shift in transit, and that by reason of such sudden shifting his leg was caught and mangled so that it had to be amputated. (Id.)
6. **KNOWLEDGE OF BOY—UNAPPRECIATED PERIL—RISK NOT ASSUMED.**—Evidence that the boy knew that if he projected his foot beyond the elevator it would be injured does not tend to show that he knew and appreciated the fact that the truck might, by reason of its size and construction or position on the elevator, list to the side and push his foot beyond the elevator floor. If, from youth or inexperience, or both combined, he did not appreciate the peril in which such shifting might place him, he is not deemed in law to have assumed the risk of injury, so as to relieve the defendant from any liability in placing him there without warning. (Id.)
7. **WARNINGS COMMENSURATE WITH DANGERS.**—The warnings or instructions to be given to a young and inexperienced servant must be commensurate with the dangers to which he is exposed, and if special dangers are incident to the employment, particular instructions pointing out those dangers must be given, so that they may be known and appreciated by him. (Id.)
8. **KNOWLEDGE AND APPRECIATION OF DANGER—QUESTION OF FACT.**—The law does not expect or exact from a child of tender years the same degree of care, caution, or circumspection that it does from an adult; and whether, in a given case, a minor employee is shown to have had knowledge and an appreciation of the dangers incident to his employment is (except in cases where the evidence unquestionably demonstrates that he did have it) a question of fact to be determined by the jury. (Id.)
9. **SIGNS UPON ELEVATOR FORBIDDING PERSONS TO RIDE.**—Signs upon the elevator forbidding persons to ride thereon, whether easily read or not, had application only to persons using it for their convenience, and not to servants whose duty and custom it was to take freight up therein, and did not apply to plaintiff, who was ordered to take up the loaded truck to the sidewalk and thence to a new warehouse. (Id.)
10. **SUFFICIENCY OF COMPLAINT—REVIEW UPON APPEAL FROM ORDER.**—The sufficiency of the complaint can only be reviewed upon appeal from the judgment, and cannot be considered where the only appeal is from an order denying a new trial. (Id.)

NEGLIGENCE (Continued).

11. **INSTRUCTION AS TO NEGLIGENCE—DUTY OF EMPLOYER.**—An instruction to the jury (in connection with other instructions relative to the duty of the employer where a minor is directed to perform hazardous work) pertaining to his legal duty to provide for his employees a reasonably safe place, and that his failure to do so constituted negligence, was properly given. (Id.)
12. **RAILROAD-CROSSING—DUTY OF TRAVELER—INSTRUCTIONS.**—In this state a person approaching a railroad-crossing is not authorized to assume that the persons operating a train will not in any way be negligent in that operation, and an instruction assuming the contrary is erroneous. Such crossing, from its very nature, is always a place of danger, and a traveler has no right to omit any of the care which the law demands of him, upon the assumption that due care will be exercised in the operation of the train. (Hutson v. Southern California Railway Company, 701.)
13. **CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**—In an action against a railroad company to recover damages for personal injuries caused by its negligence, the burden of proving contributory negligence rests upon the defendant. The weight of the evidence or preponderance of probability is sufficient to establish that fact, and an instruction to the jury that such defense should be proved "*to your satisfaction* by a preponderance of the evidence," should omit the italicized words. (Id.)
14. **INJURY TO TRAVELER AT RAILROAD-CROSSING—CONTRIBUTORY NEGLIGENCE.**—Though the contributory negligence of a traveler at a railroad-crossing in failing to take reasonable precautions to ascertain whether a train is approaching and to look carefully at the most available and convenient distance from the track from which an observation can be made, will preclude a recovery for resulting injury, notwithstanding the negligence of the railroad company in failing to give the proper warning or signal on approaching the crossing; yet contributory negligence on his part can only result from the fact that if he looked from a point of observation near the crossing, he could have seen the train approaching and have avoided it. (Martin v. Southern Pacific Company, 124.)
15. **POWER OF OBSERVATION OF TEAMSTER—ACTION FOR DEATH—CONTRIBUTORY NEGLIGENCE A QUESTION OF FACT—NONSUIT—NEW TRIAL.**—In an action by the wife and children of a deceased teamster for his death at a railroad-crossing from collision with an approaching train which gave no signals, where there was no field of observation until a warehouse corner was approached, and where, under all the evidence, it was a question of fact for the jury to determine, as affecting the question of contributory negligence, whether had the deceased looked down the track when he approached the warehouse corner he could have seen the train then approaching half a mile away, and whether the train could have covered

NEGLIGENCE (Continued).

- that distance while he was crossing the track, the court, after having granted a nonsuit for contributory negligence of the deceased, did not err in granting a new trial to the plaintiffs. (*Id.*)
16. **STREET RAILWAY—ORDINARY CARE REQUIRED.**—The operator of a street railway is only required to use ordinary care and caution in the management and operation of its cars to avoid inflicting injury upon a person traveling upon or using the street upon which the cars are being operated. Ordinary care is that degree of care which a person of ordinary prudence would use under the same or similar circumstances. The standard by which such degree of care is to be measured is not absolute, but varies with the circumstances attending the operation of the cars, such as the character of the cars, the agency of propulsion, the locality in which they are operated, whether in the country or in a city, whether over much-traveled or unfrequented streets, and the possibility or probability attending their operation. (*Henderson v. Los Angeles Traction Company*, 689.)
17. **INSTRUCTIONS — APPLICATION TO EVIDENCE.**—Where the court correctly instructs the jury as to the duty of a street-railway company to use ordinary care in the operation of its cars it cannot be assumed on appeal that the jury were unable to apply the instruction to the facts and circumstances of the case. It is to be assumed that the jury understood the instruction and applied it to the evidence, and if the appellant thought the instruction was too general, he should have presented more definite and specific instructions. (*Id.*)
18. **CONTRIBUTORY NEGLIGENCE—COLLISION WITH WAGON.**—In an action against a street-railway company to recover damages for personal injuries resulting from a collision between a wagon in which the plaintiff was sitting and an electric car operated by the defendant, it is proper to instruct the jury that "in determining whether or not the plaintiff was negligent you should consider whether or not under all the circumstances of the case it was his duty, using ordinary care for his own safety, to have jumped from the wagon." Such instruction leaves the question of the plaintiff's negligence to be determined from all the circumstances in the case, and, if given, renders without prejudice the refusal to give an instruction requested by the plaintiff which referred more particularly to the circumstances to be considered by the plaintiff in determining whether he should have left the wagon or not, where the circumstances were such as jurors would naturally take into consideration whether their attention was called to them or not. (*Id.*)
19. **CONSTRUCTION OF INSTRUCTIONS.**—In determining whether a jury has been properly instructed, the instructions, taken as a whole, must be considered, and if, when the entire charge is examined, the omissions or inaccuracies in a particular instruction appear to have been supplied, and the jury fairly and consistently instructed gen-

NEGLIGENCE (Continued).

erally as to the law, this is sufficient to defeat any claim of error predicated on defects in particular instructions. (Id.)

20. **LAST CLEAR CHANCE.**—In such an action, the plaintiff tendered an instruction which in effect informed the jury as to the care to be exercised by the defendant in the ordinary operation of its cars, and that it would be liable to plaintiff for injury resulting to him by reason of its negligence, "*and not by reason of his own negligence.*" The court gave the instruction as tendered, substituting for the italicized words the following: "unless you find that the plaintiff was negligent and that such negligence contributed to such injury." *Held*, that the instruction was not intended as a statement of the doctrine of the "last clear chance," and that the omission of the word "proximately" before the word "contributed" in the substituted clause did not render it erroneous, where other instructions clearly stated the rule as to the duty of the employees of the defendant to avail themselves of the last clear opportunity to avoid injuring the plaintiff after discovering his peril, even though such peril was occasioned by his own contributory negligence. (Id.)

21. **STREET RAILROAD—LIABILITY FOR INJURY TO PASSENGER—UTMOST CARE AND DILIGENCE—INSTRUCTIONS.**—In an action by a passenger on a street railroad to recover damages for personal injuries alleged to have been caused by the negligence of the carrier, it is proper to instruct the jury that "contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved; on the other hand, the proof of an injury to a passenger on the car of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff tends to show that the injury was occasioned by the contributory negligence of the passenger or by inevitable casualty, or by some other cause which human care and foresight could not prevent." Such instruction is the equivalent of the rule of law enacted in section 2100 of the Civil Code, which requires of the carrier of passengers the use of the "utmost care and diligence." (*Kline v. Santa Barbara Consolidated Railway Company*, 741.)

22. **MEASURE OF DAMAGES — LOSS OF TIME.**—In such an action, where it appears that the passenger injured was a woman of sixty-five years of age, engaged in no gainful occupation, but capable, before the accident, of taking care of herself and accustomed to active outdoor exercise, and that the effect of the accident was to make her permanently lame, and to render her to some extent unable to care for herself, and under the necessity of hiring the services of others, it is proper to charge the jury, as one of the elements of damage, that the plaintiff was entitled to recover the value of her time which she would necessarily be disabled as the result of the injury. (Id.)

NEGLIGENCE (Continued).

23. **EVIDENCE—INSUFFICIENT ALLEGATION OF DAMAGE.**—The admission of evidence in support of such element of damage, even if the complaint was insufficient in that connection, could not have operated as a surprise to the defendant and was a harmless error, when it appears that the plaintiff had submitted before the trial to a physical examination by surgeons selected by the defendant for the purpose of ascertaining what her injuries were, and whether they had been properly treated. (Id.)
24. **OPINION OF WITNESS—SPEED OF CAR.**—The refusal of the court to strike out the opinion of a witness that the car on which the plaintiff was riding was moving at an "unpardonable high rate of speed" was without prejudice, if the conceded facts were that the car had escaped all control and descended the grade at a dangerous rate of speed, which the combined efforts of motorman and conductor were insufficient to arrest or moderate. (Id.)
25. **SUFFERING OF PLAINTIFF—NON-EXPERT WITNESS.**—In such action, where the injury occasioned to the plaintiff, in addition to superficial bruises, consisted of a fracture of the neck of the femur, non-expert witnesses, who had observed her during her illness, and had heard her groans and complaints, were competent to give an opinion as to her suffering. (Id.)
26. **HYPOTHETICAL QUESTION SUBSEQUENTLY ANSWERED IN SUBSTANCE.**—The refusal of the court to permit an expert witness called by the defendant to answer a hypothetical question asked for the purpose of showing that the medical treatment received by the plaintiff had aggravated her injury, is harmless, if the witness, in answer to questions subsequently asked, was permitted to fully express his opinion as to the nature of the injury, the error in treating it, and the injurious results of the treatment. (Id.)
27. **STREET RAILWAY—DUTY OF TRAVELER ON TRACK—REASONABLE CARE.** One riding or walking along the track of a street-railway company must use reasonable care in the exercise of his faculties of sight and hearing to watch and listen for cars going in either direction. A failure to hear or see the car is not, *per se*, proof of negligence in all cases. Whether such exercise of the faculties as, under all the circumstances of the case, was reasonable, would have averted the injury is a question of fact. The degree of vigilance to be exercised by the person on the track is to be determined by the jury, and not laid down as matter of law, wherever the question of contributory negligence is proper to be submitted to the jury at all. (Hamlin v. Pacific Electric Railway Company, 776.)
28. **BICYCLE RIDER — INSTRUCTION — CONTRIBUTORY NEGLIGENCE — EVIDENCE.**—In an action by one riding a bicycle along the track of a street railway, to recover for personal injuries inflicted by a car of the defendant, an instruction to the jury which required the exercise by the plaintiff of a greater degree of care than the law

NEGLIGENCE (Continued).

demand is without prejudice, and will not warrant a reversal of a judgment for the defendant, when the undisputed evidence contained in the record on appeal showed that the plaintiff's conduct while so riding was so lacking in every element of proper care for his own safety that the court would have been bound to set aside any verdict based upon a finding that he had not been guilty of contributory negligence. (Id.)

29. **APPEAL—ERROR IN INSTRUCTION MUST BE SHOWN BY EVIDENCE.**—It is incumbent upon the party appealing to show, not only abstract error, but error prejudicial to him upon the facts in evidence, and to avail himself of the point that an instruction was erroneous, he must bring before the court sufficient evidence to show that, upon a proper instruction, there might have been a finding in his favor. (Id.)
30. **LAST CLEAR CHANCE.**—In such an action, an instruction purporting to state the law on the subject of the care to be exercised by the plaintiff to avoid injury, which is silent as to the law of the "last clear chance" doctrine, is not erroneous, if the instructions taken as a whole fully charged the jury as to that doctrine. (Id.)
31. **INSTRUCTION ASSUMING FACTS—EVIDENCE SUSTAINING ASSUMPTIONS.**—It was not error to charge the jury that "If you find from the evidence that the motorman in charge of defendant's car, when about a block away from the point of the accident, saw the plaintiff riding upon his bicycle between the inner rails of the defendant's east-and-west tracks, and far enough away from the track on which he was propelling his car so that his said car could have passed the said plaintiff safely, and that he gave warning of his approach, and that the front of his car did pass the plaintiff, and that the plaintiff then, either through excitement or otherwise, lost his balance, veered in towards the car, and that the hind step of said car struck plaintiff, and that the said car was traveling upon a straight track at the time of the accident, then I charge you that your verdict must be for the defendant," when there was evidence which, if believed by the jury, sustained each element of the hypothesis stated in the instruction. (Id.)
32. **PRESUMPTION OF CARE IN STARTING TO RIDE ON TRACKS.**—Where all the evidence showed that the plaintiff had been riding along or upon the track for a block and a half before he was struck by the defendant's car, it is immaterial whether he had exercised due care at the time he started to ride along the street; and an instruction that the law presumes, in the absence of evidence to the contrary, that he looked and listened to ascertain whether a car was approaching from the rear, before getting upon the track, is properly refused as being inapplicable to the facts. (Id.)
33. **ACTION BY MINOR FOR NEGLIGENCE—ERRONEOUS APPOINTMENT OF GUARDIAN AD LITEM—CONSENT NOT PRESUMED.**—In an action by a

NEGLIGENCE (Continued).

minor aged sixteen years for injuries from alleged negligence of the defendant the appointment of a guardian *ad litem* by the superior court, not made as required by section 373 of the Code of Civil Procedure, upon application or nomination of the minor, but made solely on the application of the person appointed, is erroneous. It cannot be presumed upon appeal, against the record, that the consent of the minor was given to the appointment; and the error shown by the record, being jurisdictional, would, if not cured, necessitate a reversal of the judgment. (*Johnston v. Southern Pacific Company*, 535.)

34. CURE OF ERROR—AFFIRMANCE AFTER MAJORITY PENDING APPEAL.—The error must be deemed cured where it appears that the minor attained majority pending appeal before the hearing, and upon the hearing affirmed all that had been done in her behalf, and declared her willingness to be bound in all future matters by the proper judgments and orders of the court. (*Id.*)
35. PERMANENT INJURIES TO PLAINTIFF—TESTIMONY OF ATTENDING PHYSICIANS—POWER AND DUTY OF COURT TO ORDER PERSONAL EXAMINATION.—Where the plaintiff seeks recovery for permanent injuries which are objective and physical, and offers the testimony of attending physicians to prove the nature and extent of the injuries sustained, the court has power, and it is its duty, to order a physical examination in the presence of plaintiff's physicians and the physicians of the defendant, to ascertain the nature and extent of such injuries. (*Id.*)

NEW TRIAL.

1. ESTATES OF DECEASED PERSONS—ORDER SETTING APART HOMESTEAD—FAMILY ALLOWANCE.—A motion for a new trial is not a proper procedure for the reconsideration of orders setting apart a homestead and exempt property to a widow, and awarding her a family allowance, as it is the duty of the court *ex parte* and without petition to make such orders. (*Shipman v. Unangst*, 425.)
2. BILL OF EXCEPTIONS—APPEAL FROM ORDER.—A bill of exceptions, presented to be used on such a motion, cannot be settled as a bill to be used on appeal from such orders when it was presented too late for such purpose. (*Id.*)
3. MOTION ON MINUTES OF COURT—SUBMISSION WITHOUT ARGUMENT—REVIEW ON APPEAL FROM ORDER AND JUDGMENT—STATEMENT OF CASE.—Where the record on appeal from an order denying a new trial shows that the statement, which contained no copy of the notice of intention to move for a new trial, was settled and filed subsequent to the date on which the order was made, it must be inferred that the motion for a new trial was made on the minutes of the court; and under section 661 of the Code of Civil Procedure, the appellate court, on an appeal from such order, can review only

NEW TRIAL (Continued).

the matters presented and argued to the lower court in support of the motion. And where the record affirmatively shows that the motion was submitted without argument it cannot be presumed that any of the grounds of the motion were argued, and the order of the trial court in denying the motion cannot be reviewed, and must be sustained without an examination of the evidence. Such statement may, however, be used on appeals from the judgment taken within sixty days after its rendition, for the purpose of determining the sufficiency of the evidence to support the findings. (*Blood v. La Serena Land and Water Company*, 764.)

4. **ORDER DENYING NEW TRIAL—DELAY IN SERVICE OF STATEMENT—SHOWING OF RELIEF—REVIEW UPON APPEAL—RECORD.**—Upon appeal from an order denying a new trial, where admittedly the proposed statement on the motion was not served in time, if the record does not disclose any action of the court, upon a proper showing, under section 473 of the Code of Civil Procedure, relieving the moving party from the effect of such failure, the settled statement cannot be considered. A notice of motion for such relief, and a minute order granting it printed in the transcript but not embodied in the statement or bill of exceptions, is no part of the record. (*King v. Dugan*, 258.)
5. **PRACTICE—SETTLED STATEMENT—SUFFICIENCY OF SHOWING AS TO RELIEF FROM DEFAULT.**—Though it is the better practice to incorporate in the settled statement a showing in terms that application for relief from default was made, and that the court granted the same; yet this substantially appears, where the settled statement shows that the only response to the objections that the statement was not prepared or served in time, consisted of affidavits of mistake, surprise, and excusable neglect, sufficient to justify the discretion of the court in granting relief from the default, and that the objections were heard in open court and submitted upon the affidavits, counter-affidavits, and a rebutting affidavit, and were overruled, and the statement was ordered settled and filed; and such settled statement will be considered upon appeal. (*Id.*)
6. **ORDER GRANTING NEW TRIAL—BILL OF EXCEPTIONS—REVIEW UPON APPEAL.**—If the grounds of the motion for a new trial are such as can be presented only by a bill of exceptions or statement, and the notice calls for a bill of exceptions, and if the bill asked for at the hearing cannot be properly considered, the order should be reversed; but if it can be properly considered, and justifies the order, it must be affirmed. (*Pollitz v. Wickersham*, 238.)
7. **FAILURE TO SERVE BILL IN TIME—OBJECTION RESERVED—PRESENTATION UPON SETTLEMENT—LAPSE OF TIME—POWER TO RELIEVE FROM DEFAULT.**—Where the proposed bill of exceptions on motion for new trial was not served within the time prescribed by law, and at the time of service objection was reserved on that ground, but

NEW TRIAL (Continued).

the objection was not presented to the court until the bill came up for settlement, one day after the expiration of six months from the time of service, the court had power, upon the presentation of such objection, or within a reasonable time thereafter, upon a proper showing of excusable neglect under section 473 of the Code of Civil Procedure, to relieve the moving party from the default in service. (Id.)

8. **CONSTRUCTION OF CODE—"PROCEEDING TAKEN AGAINST" MOVING PARTY.**—There was no "proceeding taken against" the moving party within the meaning of the code until the objection was presented by the opposing party to the court as a ground for an order against the moving party. The mere reservation of objection to the service did not constitute a "proceeding" within the meaning of the statute. (Id.)
9. **SUPPORT OF ORDER GRANTING NEW TRIAL—PRESUMPTION—OPINION.**—Where the order granting a new trial upon the settled bill of exceptions, after the granting of relief from default, was in general terms, not purporting to exclude any grounds stated in the notice, one of which was insufficiency of the evidence to justify the decision, if it is sustainable on that ground, it must be presumed in favor of the order that it was granted for that reason, regardless of any reason stated in the opinion of the trial court. (Id.)
10. **DUTY OF JUDGE AS TO NEW TRIAL—EFFECT OF EVIDENCE—PRESUMED CHANGE OF OPINION.**—It is the duty of the judge of the trial court to grant a new trial, whenever he is not satisfied with the verdict of the jury, or the findings of the court. He is not bound by the rule as to conflicting evidence; and where insufficiency of the evidence is one of the grounds of the motion it must be presumed in favor of the order granting a new trial that the court changed its opinion as to the effect of the evidence, and reached a conclusion more favorable to the moving party. (Id.)
11. **NEW TRIAL TO DEFENDANT UNDER CROSS-COMPLAINT—SALES OF STOCK UPON MARGIN—REVIEW OF PLAINTIFFS' EVIDENCE.**—In an action by stock-brokers to recover moneys advanced upon the purchase and sale of stocks, where a new trial was granted to the defendant upon a cross-complaint alleging that the purchases and sales of stock were upon margin, to be delivered at a future day, in violation of the constitution, the court in determining whether the assailed findings against the defendant were supported by the evidence had the right to consider all the evidence, including that given by plaintiffs in support of their claim, involving the same transactions in respect to which relief was sought by the cross-complaint. (Id.)
12. **PROBATIVE FINDINGS NOT CONSIDERED—ADMISSIONS AND EVIDENCE.**—The court in determining the sufficiency of the evidence to sustain the findings assailed was not required to consider probative find-

NEW TRIAL (Continued).

ings not assailed, but the question is to be determined upon the admissions of the pleadings and the evidence given upon the trial (Id.)

13. **SUFFICIENCY OF EVIDENCE TO SHOW SALES UPON MARGIN.**—Upon a review of the evidence in the record, it is held sufficient to warrant an inference and to support findings by the trial court that purchases and sales of stock, advances upon which were sought to be received by plaintiffs, were purchased and sold by plaintiffs upon margin to be delivered at a future day, as alleged in defendant's cross-complaint. (Id.)
14. **ADMISSIONS IN CLAIM PRESENTED BY PLAINTIFFS.**—Admissions made by the plaintiffs in their verified claim first presented against the estate of the deceased testator (after the rejection of which a second claim in different terms was presented, which was sued upon) was admissible, and might be considered by the court as an admission against interest in granting the new trial. (Id.)
15. **REVIEW OF NONSUIT—ERROR OF LAW.**—A ruling granting a nonsuit, if excepted to and specified as such, may be reviewed upon appeal as an error of law. (Martin v. Southern Pacific Company, 124.)
16. **STATEMENT AND BILL OF EXCEPTIONS—NOTICE OF INTENTION—SPECIFICATIONS.**—A statement and a bill of exceptions may be incorporated in the same paper; and where both were settled as such, and the ruling granting the nonsuit and the exception to it appeared in the substantive part of the case, no other specification of error was necessary than that contained in the notice of intention to move for a new trial embodied in the bill of exceptions, giving as one ground of the motion errors of law occurring at the trial and excepted to by plaintiffs. A specification of particular errors relied upon, though required in a statement, is not required in a bill of exceptions. (Id.)

See Agency, 1; Appeal, 2; Bill of Exceptions, 1, 3, 4; Estates of Deceased persons, 17; Negligence, 10.

NOTARY PUBLIC.**ACKNOWLEDGMENT OF DEED—SUFFICIENCY OF CERTIFICATE AND SIGNATURE.**

—A certificate of acknowledgment of a deed made before a notary public, which recites his name and official character as a notary public in and for the county named, in the usual form, and is signed by him merely with the words "Notary Public" after his signature, sufficiently states the name of his office, within the requirement of section 1193 of the Civil Code, to entitle the deed to record. (Duckworth v. Watsonville Water and Light Company, 520.)

NUISANCE.

1. PUBLIC NUISANCE—OBSTRUCTION OF HIGHWAY—ABATEMENT—CIVIL ACTION BY PEOPLE—AUTHORITY OF DISTRICT ATTORNEY.—An unlawful obstruction of a public highway is a public nuisance, which the district attorney, under the act of March 15, 1899, has authority of his own motion to bring a civil action in the name of the people to abate, without any previous order of the board of supervisors directing him to do so. (*People v. McCue*, 195.)
2. CUMULATIVE REMEDIES.—The fact that other remedies may exist for the abatement of such public nuisances as obstructions of public highways cannot affect the power expressly conferred by law upon the district attorney. (*Id.*)
3. OBSTRUCTION OF STREETS — PLEADING — FINDINGS — PROBATIVE AND ULTIMATE FACTS—SUPPORT OF JUDGMENT.—In an action to abate obstructions to several streets, where, independently of probative facts alleged and found, it was unconditionally alleged and found as a fact that "each and all of such streets are public highways," that is an ultimate fact, and where the probative facts found are not necessarily inconsistent therewith, and no evidence appears in the records, the finding of that ultimate fact must prevail, and is sufficient to support a judgment for the people abating the obstructions. (*Id.*)
4. PUBLIC NUISANCE—UNAUTHORIZED CONSTRUCTION OF RAILROAD IN STREET—PRIVATE ACTION—SPECIAL INJURY—RULES OF PLEADING—STATEMENT OF FACTS.—A railroad constructed on a public street without authority constitutes a public nuisance; but a private person may maintain an action therefor if it is specially injurious to himself, but not otherwise; and he must allege facts showing a special injury, not only greater in degree but different in kind from that suffered by the general public. General allegations of special or irreparable injury are insufficient; and the pleader must state facts from which the court can determine whether such injury exists. (*City Store v. San Jose-Los Gatos Interurban Railway Company*, 277.)
5. STREET RAILROAD — ACTION BY ABUTTING OWNER — INJUNCTION — INSUFFICIENT COMPLAINT.—A complaint in an action by an abutting owner to enjoin the construction, operation, and maintenance of a double-track street railroad in a public street without right, which merely alleges as a resulting injury that "the property of plaintiff and the property rights of plaintiff will be irreparably injured and damaged in this, that the value of said property will be greatly diminished, free access in and to said property will be irreparably injured, and the rental value of said property will be greatly and permanently decreased,"—without stating the width of the street, or the proximity of the tracks to plaintiff's property, or whether any embankment or depression will be created preventing access to plaintiff's property, or that the operation of the road

 NUISANCE (Continued).

itself will affect him,—is insufficient, and a general demurrer thereto was properly sustained. (Id.)

6. **GENERAL AND SPECIAL ALLEGATIONS OF IRREPARABLE INJURY—OPINION OR CONCLUSION OF PLEADER.**—The allegations in the complaint of irreparable injury in general, and of the particular specifications relative to it, amount to nothing more than the expression of an opinion or conclusion of the pleader, and do not constitute a statement of facts from which the court could determine whether the plaintiff's apprehensions of special injury are well founded or not. (Id.)
7. **PUBLIC NUISANCE—RIGHT OF PRIVATE ACTION.**—A public nuisance may inflict upon an individual such peculiar injury, different in kind, and not merely in degree, from that suffered by the general public, as to entitle him to maintain a separate action to abate it, and to recover damages therefor. (*Brown v. Rea*, 171.)
8. **OBSTRUCTION TO HIGHWAY—RAILROAD—RIGHTS OF ABUTTING OWNERS.**—Ordinarily an unauthorized and illegal obstruction to a highway is a public nuisance; and it may constitute a private nuisance as well to an abutting owner, if it obstructs his easement to a right of access from his land to the highway and from the highway to his land. But the operation of a railroad upon a street is not as to abutting owners *per se* a nuisance. It may or may not be a nuisance, according to the manner of its construction and operation, and to surrounding circumstances. (Id.)
9. **INJUNCTION NOT SUPPORTED—MERE OPERATION OF RAILROAD.**—The mere fact that railroad-cars are to be operated in a street adjoining plaintiff's property does not show any such peculiar injury to him as will justify an injunction restraining the construction and operation of the railroad. (Id.)
10. **PLEADING—INSUFFICIENT COMPLAINT.**—A complaint seeking to enjoin a railroad as an obstruction to the right of access of the plaintiff, which does not set forth any facts which show that his right of access has been obstructed by the work already done, or will be obstructed or impaired by the work to be done, but merely alleges his opinions and conclusions on that subject; and alleges that the defendants are constructing and intend to operate a four-track railroad upon the street in front of his premises, without stating the width of the street or the location or manner of construction of the ties and rails, or how often or in what manner cars or motors will be run upon them, or whether it will be a steam or a street railroad, does not state a cause of action justifying an injunction restraining its construction and operation. (Id.)
11. **DAMAGES NOT SUSTAINED.**—A complaint, whether seeking damages or an injunction, which fails to show some actual or threatened injury to a private property right of the plaintiff is insufficient to justify either. The allegation that the proposed work will "greatly

NUISANCE (Continued).

lessen and diminish the value" of the property is too indefinite; and an averment that defendants have commenced excavating the street, and made a deep and wide trench therein "which greatly obstructs and impedes traffic on the street," is also too indefinite; and where there is no averment that the trench is in front of plaintiff's premises, or that it obstructs plaintiff's ingress and egress, the complaint fails to show a cause of action, for damages as well as for an injunction. (Id.)

OYSTER BEDS. See Partition, 2.

PARENT AND CHILD.

1. **DUTY OF PARENT TO SUPPORT ADULT CHILD—ACTION TO ENFORCE MAINTENANCE—JUDGMENT.**—Under section 206 of the Civil Code the duty imposed upon parents to maintain their adult children who are poor and unable to maintain themselves by work is a legal duty, and creates a correlative legal right in the children to have such maintenance, and they are proper parties to an action to enforce such right and compel the performance of such duty. Such right may be enforced by an action in equity, and in such action the court would have full jurisdiction to pronounce a judgment, reserving the power to modify it in the event that the changed conditions in the future should justly demand a modification. (Paxton v. Paxton, 667.)
2. **SUIT MONEY, COUNSEL FEES, AND MAINTENANCE PENDENTE LITE.**—In an action to enforce the right given by section 206 of the Civil Code the court has power to make all orders necessary for that purpose, including orders for suit money, counsel fees, and maintenance *pendente lite*. (Id.)
3. **FATHER AND MOTHER AS DEFENDANTS—CHANGE OF VENUE.**—A mother may be joined with the father as a defendant in an action by a child to enforce the right of maintenance, and where an action is brought in the county of her residence the place of trial will not be changed to the county in which the father resides if the mother does not join in the motion for the change. (Id.)

See Estates of Deceased Persons, 1-4.)

PARK.

PUBLIC PARK—USE FOR PUBLIC LIBRARY—ADMINISTRATION PURPOSES—INJUNCTION.—The erection of a building for a public library in a public park, with rooms therein as a meeting-place for the board of library directors of the city, is a legitimate use of a portion of the park which cannot be enjoined at suit of an abutting owner and taxpayer; but the use of the library building for administration purposes, such as for rooms for the board of education, or for any other municipal body, may be enjoined. (Spires v. City of Los Angeles, 64.)

PARTIES.

1. **SUBSTITUTION OF DISTRIBUTEE OF ESTATE—ASSIGNMENT—FORECLOSURE.**—Where pending an action of foreclosure a promissory note and mortgage are regularly assigned, and subsequently are distributed by the decree of distribution in the estate of the assignee, the distributee, as a successor in interest, has the right, under section 385 of the Code of Civil Procedure, to be substituted as plaintiff in the foreclosure suit, notwithstanding the fact that neither the assignee in his lifetime, nor his representative after his death, had been substituted as plaintiff. (*The L. W. Blinn Lumber Company v. McArthur*, 610.)
2. **PRIMA FACIE CASE—PROOF OF NON-PAYMENT OF NOTE.**—Where it is admitted that at the time the suit was commenced the note was unpaid, the substituted plaintiff made out a *prima facie* case by the introduction of the assignment of the note and mortgage and the decree of distribution; and the burden of proving that the note had been subsequently paid was on a purchaser of the mortgaged premises, who had intervened in the action. (*id.*)

See Corporations, 9, 10; Dupont-Street Bonds, 8; Mortgage, 5.

PARTITION.

1. **FINDING OF PLAINTIFF'S OWNERSHIP—POSTPONEMENT OF SALE—LITIGATION WITH THIRD PARTY.**—In an action for partition of land, of which the court found that the plaintiff was an owner of an undivided interest, the fact that the title of the plaintiff was in dispute in an action with a third party is not a reason for postponing the sale of the entire land under the interlocutory decree. Such fact was not available as ground for a plea in abatement to the action for partition, since neither parties nor subject-matter were the same in the two actions; and if, for any reason, the price realized was so low as to justify the court in concluding that the sale had not been fair to all parties concerned, confirmation would be refused and a resale ordered. (*Schoonover v. Birnbaum*, 734.)
2. **RIGHT TO USE OF STATE LANDS FOR OYSTER-BEDS—CONSTRUCTION OF STATUTE—MERE PERSONAL LICENSE.**—An action for partition cannot be maintained in respect of the rights conferred by the "act to encourage the planting and cultivation of oysters," approved March 20, 1874. There is no element of an estate of inheritance or a perpetual estate conferred by that act; but it grants a mere personal license, not inheritable or transferable, which may be revoked by the state. (*Darbee and Immel Oyster and Land Company v. Pacific Oyster Company*, 392.)

See Appeal, 3.

PARTNERSHIP.

1. **REAL ESTATE—PAROL AGREEMENT.**—A partnership for the purpose of buying, holding, and selling lands may be formed by an agree-

PARTNERSHIP (Continued).

ment resting in parol, and such parol agreement is valid. (*Koyer v. Willmon*, 785.)

2. **PURCHASE BY PARTNER IN INDIVIDUAL NAME—CONSTRUCTIVE TRUST—TENDER OF PURCHASE PRICE—COSTS.**—Where a partnership is entered into for the purpose of buying a particular lot of land, each of the partners occupies the position of a trustee to the other with regard to all the partnership transactions, including the transactions contemplated by the firm and constituting the object or purpose for which the partnership was formed; and if one of the partners, after securing an option on the lot while acting for the firm, subsequently purchases it in his own name and with his individual money, he becomes a constructive trustee for his copartner to the extent of the latter's interest in the partnership. In such a case, the beneficiary of the constructive trust may tender to and offer to pay into court for the trustee whatever may be found just and equitable, and demand a reconveyance from the trustee, to be delivered on payment of the money. The fact of a previous tender of payment is usually important only to the determination of the question as to which of them shall recover costs. (*Id.*)

3. **EXCUSE OF TENDER.**—A statement by the beneficiary to the trustee that he wanted the property so bought by the latter and that he was ready to pay for it, and the reply of the latter that he was going to keep it for himself, rendered unnecessary a formal tender by the beneficiary of his portion of the purchase price as a condition precedent to his right to maintain an action to enforce his rights. (*Id.*)

4. **PARTNERSHIP CONCERNING PARTICULAR LANDS.**—One who is a general partner in the real estate business may enter into a particular partnership with a third person relating to a particular piece of land. (*Id.*)

PAWNBROKERS.

1. **DEFINITION.**—To constitute a person a pawnbroker he must receive goods in pledge for loans of money at interest, and this must be his business, or a well-defined part thereof, as contradistinguished from a single transaction or occasional loans upon pledge. (*Levinson v. Boas*, 185.)

2. **NATURE AND LIMITS OF BUSINESS.**—Although a pawnbroker limits his business, as such, to pledges of jewels and jewelry only, and, at the same time and place, conducts the business of a money-lender and requires the pledgor or pawnor of jewelry to execute a note or chattel mortgage upon jewelry transferred to his possession as security for loans of money thereon at interest, such facts do not render his business of receiving goods in pledge for such loans any the less that of a pawnbroker. (*Id.*)

3. **PLEDGE DISTINGUISHED FROM MORTGAGE.**—Every contract by which the possession of personal property is transferred as security only

PAWNBROKERS (Continued).

is deemed a pledge; and the very fact that the pawnbroker took possession of the property as a pledge, and relied upon it as such, negatives the conception of a chattel mortgage. (Id.)

4. **BUSINESS A SUBJECT OF POLICE REGULATION.**—The business of pawnbroker has always been the subject of police regulation for the benefit of the public, and it is unlawful if not conducted under the provisions, restrictions, and requirements of the law. (Id.)
5. **STATUTES FOR PROTECTION OF PUBLIC—VIOLATION—VOID CONTRACT.**—Wherever a statute is made for the protection of the public a contract in violation of its provisions is void. (Id.)
6. **VIOLATION OF PENAL LAWS REGULATING PAWNBROKERS—VOID PLEDGE—RECOVERY BY PLEDGOR.**—Where a pawnbroker has violated a city and county ordinance requiring a special license, and the provisions of the Penal Code on that subject, and also its penal provisions requiring him to make a complete registry of each transaction, and to deliver a written copy thereof to the pledgor, and forbidding loans on pledges in excess of ten per cent per annum, a contract of pledge in violation of such penal provisions is void, and the right of the pledgee to hold the property is lost, and the possession thereof may be recovered by the pledgor. (Id.)

PAYMENT. See Parties, 2.

PLACE OF TRIAL.

1. **VENUE—REAL ACTION—SPECIFIC PERFORMANCE BY PURCHASER—CONVEYANCE OF TITLE—INCIDENTAL ACCOUNTING.**—An action by a purchaser for a specific performance of a contract for the sale of land, and to compel a conveyance under an allegation that the purchase price has been paid, pursuant to agreement, from the proceeds of sales of fruits and lands made by defendant, for which proceeds an accounting is sought, with judgment for a surplus alleged, is in its nature an action to determine a right or interest in real property under subdivision 1 of section 392 of the Code of Civil Procedure, which, wherever commenced, must be tried, upon demand by the defendant, in the county where the land is situated. The accounting of profits to determine payment of the purchase money and to obtain judgment for any surplus, is merely incidental to the real cause of action and relief sought, and does not change the nature of the action. (*Grocers' Fruit Growing Union v. Kern County Land Company*, 466.)
2. **RIGHT OF CORPORATION TO CHANGE VENUE—PROTECTION UNDER FOURTEENTH AMENDMENT—CONSTRUCTION OF STATE CONSTITUTION AND LAW.**—The right of a corporation sued in the county of its principal place of business, pursuant to subdivision 16 of article XII of the state constitution, "subject to the power of the court to change the place of trial, as in other cases," to have the venue

PLACE OF TRIAL (Continued).

of an action to compel a conveyance therefrom changed to the county where the land is situated, under subdivision 1 of section 392 of the Code of Civil Procedure, is to be viewed in the light of the fourteenth amendment to the federal constitution, which insures to corporations and individual persons equal protection under state laws. (Id.)

3. **PLACE OF COMMENCEMENT OF ACTION—PLACE OF TRIAL.**—An action for specific performance is not an action "for the recovery of the possession of" or "quieting the title to real estate," which is required under section 5 of article VI of the constitution to be commenced in the county where the land is situated. Such action is only required to be tried in the county where the land is situated. It may still be commenced in the county of the principal place of business of a corporation defendant, and the right remains to the corporation to have the place of trial changed to the county where the land is situated, under subdivision 1 of section 392 of the Code of Civil Procedure. (Id.)

See Parent and Child, 3.

PLEADING.

1. **CONTRACT PLEADED IN ANSWER—ADMISSION OF DUE EXECUTION.**—Where a written contract, purporting to have been signed by an attorney in fact, is set up in the answer as a defense to the action, and the plaintiff does not within ten days after receiving a copy of the answer file an affidavit denying the due execution of the contract, as required by section 448 of the Code of Civil Procedure, the genuineness and due execution of the contract are admitted, and the plaintiff cannot on the trial introduce evidence of a want of authority of the attorney to sign the name of his principal. (*Reynolds v. Pennsylvania Oil Company*, 629.)
2. **ACTION TO DETERMINE ADVERSE CLAIMS TO REALTY.**—The complaint in an action to determine adverse claims to real property, brought against a corporate defendant properly named and four other defendants sued by fictitious names, which alleges that the names of the defendants sued by fictitious designations were unknown to the plaintiff, that the title in fee to the land was in the plaintiff, and in the usual manner avers that the defendants, without right, make some claim thereto adversely to plaintiff's title and estate, states a cause of action under section 738 of the Code of Civil Procedure, and not under sections 749-751 of that code. (*City of Los Angeles v. Los Angeles Farming and Milling Company*, 647.)
3. **PROCEEDING UNDER SECTIONS 749-751 OF THE CODE OF CIVIL PROCEDURE.**—Where the action was begun after the act of March 8, 1903, amending sections 749, 750, and 751 of the Code of Civil Procedure, took effect, the question whether or not it is a proceeding

PLEADING (Continued).

under those sections is to be determined by the terms of the sections as then amended. (Id.)

4. **JUDGMENT BY DEFAULT—EVIDENCE NOT REQUIRED.**—In such an action a judgment by default against the named defendant, who had been personally served with summons, is not void for the failure of the record to show that the court heard or required evidence in proof of the plaintiff's case. No such proof was required, as the default of the defendant in an ordinary action of this character admits, so far as such defaulting defendant is concerned, the absolute verity of all the allegations of the complaint. (Id.)
5. **COMPLAINT ON JOINT AND SEVERAL CONTRACT—TRIAL AND JUDGMENT AGAINST ONE DEFENDANT.**—A complaint in an action against several defendants, alleging the employment of the plaintiff, and that the defendants agreed to pay him for his services the reasonable value thereof in a sum specified, is based upon a joint and several contract, and under sections 414 and 579 of the Code of Civil Procedure, the court was authorized to proceed with the trial against a single defendant who had voluntarily appeared, and to render judgment against him. (Bell v. Adams, 772.)
6. **DENIAL OF CONTRACT BY SINGLE DEFENDANT—SUFFICIENCY OF FINDINGS.**—In such an action, where the defendant appearing separately answered, denying the contract as set out, and denying that he ever agreed to pay for such services, or that they were ever rendered, or that they were of the value alleged or any value in excess of a smaller sum which was claimed to have been paid, findings that the contract set out was entered into between the plaintiff and the defendant appearing, and that such defendant agreed to pay the reasonable value of the services, and that the same were rendered and were of the value as alleged in the complaint, and that such defendant had paid no part thereof, are not at variance with the issues raised by the pleadings, and are sufficient to sustain a judgment against such defendant. (Id.)

See Contract, 2, 3; Dupont-Street Bonds, 1-3; Ejectment, 2, 5; Negligence; Nuisance, 3-6, 10, 11; Practice, 4-7; Quieting Title; Statute of Limitations, 2; Water and Water-Rights, 19.

PLEDGE. See Pawnbrokers.

PRACTICE.

1. **ACTION TO ENFORCE STATUTORY RIGHT.**—Where a right is given by statute without any prescribed remedy it may be enforced by any appropriate method recognized by the general law of procedure. (Paxton v. Paxton, 667.)
2. **DISMISSAL OF ACTION—WANT OF DILIGENCE IN PROSECUTION.**—The superior court, in ruling upon a motion to dismiss an action for want of diligence in prosecuting the same, may properly con-

PRACTICE (Continued).

sider any facts appearing in the record of the case and bearing upon the question of diligence and good faith, whether the same occurred before the action was begun or afterward, and in reviewing the action of the superior court, and considering whether or not its discretion was properly exercised, the appellate court should also take such circumstances into consideration. (*People's Home Savings Bank v. Sherman*, 793.)

3. **FACTS SHOWING WANT OF DILIGENCE.**—An action by a banking corporation which is in process of liquidation, to recover an unpaid subscription from a former stockholder, who had transferred his stock without consideration, is properly dismissed for want of prosecution, when it appears that the corporation continued to do business for more than three years after its officers knew of its insolvency without questioning the validity of the transfer; that after a call had been made it delayed until the last day possible to bring the action in order to avoid the bar of the statute of limitations, and then brought the action in the wrong county, and that it waited for three years before pressing for hearing a motion to transfer to the proper county, and more than a year after issue joined before taking any steps to bring the cause to trial, during all of which time constant and repeated efforts were being made to settle and adjust the case. (*Id.*)

4. **AMENDMENT OF COMPLAINT — IMPOSITION OF TERMS — APPEAL — APPROPRIATION OF WATER.**—Where on the trial of an action to quiet title to the appropriated waters of a specified stream, the plaintiff, after a jury have been impaneled, asks leave to file an amended complaint setting up title by appropriation to the mingled and combined waters of such stream and another stream, in lieu of his claim of title to the waters of the stream specified in the complaint, it is within the discretion of the trial court, under section 473 of the Code of Civil Procedure, to allow the amendment, and to impose such terms as may be just; and the appellate court will not review the exercise of the discretion, but may review the justness of the terms imposed. And it is not necessary that the propriety of imposing terms should be shown by affidavits, where the motion for the amendment is made in open court, and the defendant resists it on the ground that if allowed he would not be able to go on with the trial, and that a continuance would be necessary. (*Williams v. Myer*, 714.)

5. **JUSTICE OF TERMS IMPOSED—PER DIEM AND MILEAGE OF GENERAL JURY PANEL.**—In granting leave to file the amended complaint, under such circumstances, the court is limited in the imposition of terms to such only as are just,—that is, to such as will compensate the adverse party for the loss or inconvenience which he will suffer by granting the application,—and is not limited to imposing only such costs as might be properly taxed in the case. Within this rule the court may require the payment by plaintiff of the fees paid

PRACTICE (Continued).

by the defendant for the per diem of jurors impaneled and sworn to try the case, the expenses incurred by the defendant in obtaining the attendance of witnesses and in the employment of attorneys, and his own expenses in attending the trial, but cannot, in addition, require the payment to the clerk of the court for the county of the per diem and mileage paid by and due from the county to the general panel of jurors summoned for the trial. (Id.)

6. **PAYMENT OF JUST TERMS.**—If the court in fixing the terms for the granting of the amendment imposed the payment of an aggregate sum, some of the items of which are just and some unjust, it was not incumbent on the plaintiff to offer to pay the amounts which he deemed were properly assessed in order to avail himself of the error of the trial court in imposing the unjust items; nor is it material that the court might have refused to allow the amendment unconditionally. (Id.)
7. **GOOD FAITH OF AMENDMENT—REVIEW OF ORDER REFUSING AMENDMENT—EVIDENCE.**—In reviewing the refusal of the court to grant the amendment to the complaint unless the unjust terms were complied with, it must be assumed that the amendment was sought in good faith, and that the allegations in respect to the appropriation of the combined waters were true. And such error will not be deemed harmless, as there could be no trial of the cause on its merits, nor determination of the plaintiff's rights, by limiting the inquiry to the appropriation of the waters of the single stream specified in the complaint; and especially will the error not be deemed harmless where the defendant, on the cross-examination of the plaintiff's witnesses, and in introducing evidence in support of his own case, brought out the fact that the plaintiff's lands were watered by such combined waters, and the court again refused to permit the amended complaint to be filed in order that the pleadings and proof might conform. (Id.)

See Appeal; Attachment; Bill of Exceptions; Certiorari; Costs; Ejectment; Evidence; Findings; Injunction; Judgment, *Mandamus*; New Trial; Parties; Place of Trial; Pleading.

PRESCRIPTION. See Evidence.

PRINCIPAL AND AGENT. See Agency.

PROHIBITION. See Attorney and Client, 6; Divorce, 3.

PROMISSORY NOTES.

1. **CONSIDERATION—SALE OF STOCK—SUPPORT OF FINDING.**—In an action upon a note, the consideration of which was assailed, a finding that the consideration was the sale of shares of stock in a corporation is sufficiently sustained where testimony for the plaintiff, an admission in the answer, and the terms of the contract of purchase

PROMISSORY NOTES (Continued).

showed that it was a sale, and it appears that the stock was transferred on the books in the name of the purchasers, who finally disposed of the same as owners. (Commercial and Savings Bank of San Jose v. Pott, 358.)

2. **TERMS OF CONTRACT—COLLATERAL SECURITY—DIVIDENDS—POWER OF DISPOSITION.**—The fact that the contract provided that the stock was to be held by the vendor as collateral security for the purchase money, and that while so held all dividends thereon should be owned by and paid to the transferees, does not tend to negative their ownership of the stock where it also gave them full power to sell and dispose of the stock while so held. (Id.)
3. **ACTION UPON SECURED NOTE OF ONE PURCHASER—EVIDENCE—ORAL AGREEMENT—GUARANTY TO CO-PURCHASER.**—Where the note sued upon was the secured note of one purchaser of the stock, to which the other was not a party, evidence that the payee had given to the other purchaser an oral promise to guarantee him against liability on the note in suit was immaterial for the want of such liability, and incompetent to affect any right of contribution between the co-purchasers upon payment of the note, and also as being inadmissible to change or vary the terms of the written contract for sale of the stock by any prior or subsequent oral agreement. (Id.)
4. **EVIDENCE—ACTUAL VALUE OF STOCK AT TIME OF SALE—QUALIFICATION OF WITNESSES—MARKET VALUE.**—It was not error to exclude the evidence of witnesses as to the actual value of the stock at the time of the sale, with respect to which there was no evidence of their qualification to testify on that subject, where it appears that so far as its market value was concerned they were allowed to testify. (Id.)
5. **FICTITIOUS MARKET VALUE OF STOCKS—IRRELEVANT EVIDENCE.**—Where there was no evidence showing that the stock in question had any fictitious value in the market, it was not error, after appellants' witnesses had been allowed to testify as to the absence of a market value of the stock, to exclude as irrelevant a general question whether stocks may not have a fictitious value in the market. (Id.)
6. **CONSTRUCTION OF ISSUES AND FINDINGS—FRAUD—CONTRACT AS TO INTEREST AND DIVIDENDS—NON-LIABILITY FOR INTEREST—DEFENSE NOT PLEADED.**—Where the court found for plaintiff for the note and unpaid interest and against the defenses of want of consideration and fraud of the vendor of the stock in misrepresenting its value, and the answer in pleading the fraud set forth part of the terms of the contract representing and guaranteeing that interest would be kept paid out of dividends, and alleged there were no dividends or resources therefor, but did not especially plead the defense of non-liability for interest, the court was not required to
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PROMISSORY NOTES (Continued).

and thereupon, or to find whether there were sufficient dividends paid upon the stock to discharge the interest on the note. (Id.)

7. **ILLEGAL CONSIDERATION—GAMBLING DEBT—NON-NEGOTIABILITY—DEFENSE AGAINST PURCHASER.**—Promissory notes given solely to evidence an alleged indebtedness for money lost by the payor to the payee at a gambling game in a gambling-house are based upon an immoral and illegal consideration; and where they are non-negotiable, neither the payee nor any subsequent purchaser can recover upon the notes. (*Union Collection Company v. Buckman*, 159.)
8. **NEGOTIABLE NOTES—PRIMA FACIE EVIDENCE OF NOTICE—BURDEN OF PROOF—FINDING.**—Even where notes are negotiable, proof that they are based upon an illegal consideration makes out a *prima facie* case of notice of the illegality to a purchaser thereof; and the burden of proof that he took without notice and for value before maturity is thrown upon him; and in the absence of such proof the finding must be that a plaintiff purchaser is not a holder without notice and for value. (Id.)
9. **RENEWAL NOTES—ILLEGAL.**—Any renewal notes given in place of the original notes based upon an illegal consideration are affected with the same illegality. Merely repeating a promise based on an illegal consideration cannot give it validity. (Id.)
10. **COMPROMISE OF ILLEGAL NOTES.**—Whatever may be the rule as to the effect of compromise of a doubtful claim, it can have no application when the claim involved in the compromise is wholly based upon an unlawful consideration, as distinguished merely from an insufficient consideration. (Id.)
11. **PROVINCE OF COURT TO WITHHOLD RELIEF—PUBLIC POLICY—CONSENT OF PARTIES IMMATERIAL.**—The rule that the courts will not entertain any action in affirmance of an illegal contract is not based upon any consideration for the party against whom the relief is sought, but upon considerations of sound public policy; and notwithstanding his express consent that the court may enforce such illegal contract, if the illegality appears, the court will *sua sponte* withhold all relief. No action of the parties, nor of their assignees, can so validate an illegal contract as to justify the court in enforcing it where its illegality is manifest. (Id.)
12. **IMMATERIAL OMISSION IN FINDINGS.**—Where, under the findings made in reference to the illegality of the consideration, the judgment for the defendant is supported, the failure to find upon other affirmative defenses in the answer is immaterial. (Id.)

. See *Insurance*, 29-32.

PUBLIC LANDS.

1. **RAILROAD GRANT—RESERVATION WITHIN INDEMNITY LIMITS.**—*Southern Pacific R. R. Co v. United States*, 168 U. S. 1, followed to the

PUBLIC LANDS (Continued).

effect that lands within the indemnity limits of a railroad grant, which were reserved at the time of the grant but subsequently restored to the public domain, could not, after such restoration, be selected by the railroad company in lieu of losses within the primary limits of its grant. (*Wilson v. Southern Pacific Railroad Company*, 731.)

2. **HOMESTEAD CLAIM—LAND ACTUALLY POSSESSED NOT SUBJECT TO ENTRY.**—Public land of the United States actually occupied and possessed by one who has it inclosed by a substantial fence, and is using it for agricultural purposes, without other right, is not subject to entry by a qualified claimant under the Homestead Laws of the United States; and the process of obtaining from the officers of the United States a certificate of such entry, and a receipt for fees paid, in pursuance of a declaration of his intention to settle upon the land as a homestead, filed with them, does not authorize him to go upon the land so possessed and oust the prior possessor, or to recover the possession in an action against him. (*Gragg v. Cooper*, 584.)

3. **EXCEPTIONS TO RULE—LAND POSSESSED CONSTRUCTIVELY OR IN PART SUBJECT TO ENTRY.**—If public land is possessed only constructively, or is actually possessed only in part of a quarter-section, such possession does not preclude a qualified homestead claimant who has filed upon a quarter-section from entering upon that part of the homestead claim not actually possessed, and thus obtaining a title to the whole quarter-section, which will prevail as to the whole land declared upon. But these exceptions have no application where the whole land declared upon is in the actual possession of another. (*Id.*)

QUANTUM MERUIT. See Contract, 2-5.

QUIETING TITLE.

1. **ACTION TO QUIET TITLE—CROSS-COMPLAINT—JUDGMENT FOR DEFENDANTS—WAIVER OF OBJECTION.**—Where the defendants in an action to quiet title sought by cross-complaint to quiet their title against the plaintiff, and without objection thereto by demurrer or motion to strike out plaintiff answered the cross-complaint, and a trial was had upon the merits, and judgment was rendered affirmatively, quieting the title of defendants, the plaintiff must be deemed to have consented to the mode of procedure, and the objection that affirmative relief could not be granted to defendants under their cross-complaint cannot be urged by plaintiff upon appeal for the first time without regard to the question of merit in the objection. (*Johnson v. Taylor*, 201.)
2. **SUFFICIENCY OF COMPLAINT—OWNERSHIP IN FEE.**—A complaint in an action to quiet title which alleges that "plaintiff now is, and

QUIETING TITLE (Continued).

for some time hitherto has been, the owner and in possession of" the land described, and that "defendant claims some title or interest therein, and has none," states a cause of action, and is to be construed as alleging "ownership in fee" in the plaintiff. (*Meyer v. O'Rourke*, 177.)

3. ISSUES—PLEA OF "OWNERSHIP IN FEE SIMPLE"—GENERAL FINDING FOR PLAINTIFF.—Where the answer took issue upon the complaint and pleaded "ownership in fee simple" in the estate of a deceased person, a general finding for plaintiff that "each and all of the allegations of plaintiff's complaint are true and are sustained by the evidence" is sufficient to support a judgment for the plaintiff, notwithstanding failure to find upon the plea of such ownership in fee simple. (Id.)

See Water and Water-Rights, 22.

RAILROAD. See Certiorari; Negligence, 12-32; Nuisance, 4-11; Public Lands, 1.

RECEIVER. See Divorce.

ROAD DISTRICT.

1. TRANSFER FROM GENERAL FUND UNAUTHORIZED.—There is no statutory provision which authorizes the supervisors to transfer money from the general fund to the fund of any road district. (*Brown v. Klemmer*, *Davidson v. Klemmer*, 454.)
2. EXPENSE OF BRIDGES—PAYMENT OUT OF GENERAL FUNDS—EXCLUSIVE METHOD.—Section 2712 of the Political Code authorizes a portion of the expense of the construction, maintenance, or repair of a bridge to be paid for out of the general road fund of the county, when it appears that the road district would be unreasonably burdened by the expense thereof, or, by vote of two thirds of the supervisors, they may, in their discretion, pay a portion of it out of the general fund as well as out of the general road fund. This method is exclusive. (Id.)

ROADS. See Streets, Roads, and Highways.

SAN FRANCISCO. See Dupont-Street Bonds.

SPECIFIC PERFORMANCE. See Place of Trial.

STATE LANDS.

1. CONTEST OF RIGHT OF PURCHASE—INTERVENTION.—*Youle v. Thomas*, 146 Cal. 537, [80 Pac. 714], affirmed on the proposition that where the state surveyor-general has referred a contest of the right of purchase of state lands the jurisdiction of the court is

STATE LANDS (Continued).

special and limited, and the sole matter to be determined is the question of the right of the two parties between whom the contest arose in relation to the land, and other persons, each claiming as an applicant for the purchase of a portion of the land under the acts for the purchase of mineral lands, have no right to intervene in the contest. (*Youle v. Thomas*, 678.)

2. **CONTEST — ORDER DENYING INTERVENTION — APPEAL.**—In a land contest referred by the surveyor-general to the superior court, an order denying to one who claimed to be a settler upon the land in suit the right to intervene was final, and terminated the litigation as to him. He was not required to await judgment between other parties, but had the immediate right to appeal from the order after its entry. (*Dollenmayer v. Pryor*, 1.)
3. **VOID CONTEST AND REFERENCE—PROTEST OF ONE NOT A SETTLER OR APPLICANT—WANT OF JURISDICTION.**—One who is not a settler upon, or occupant of, the land, or any part thereof, and who has made no application to purchase, and who does not claim or show any right, title, or interest therein, cannot by mere protest filed against the right of one who holds a certificate of purchase under an approved application for the land, as being unfit for cultivation, institute a valid contest, and an order of the surveyor-general referring such contest to the superior court is void, and gives it no jurisdiction to render any judgment of force for or against either party. (*Id.*)
4. **AFFIRMANCE OF ORDER FOR WANT OF JURISDICTION.**—The order of intervention appealed from must be affirmed, on the ground that the court had no jurisdiction either of the action or of the intervention. (*Id.*)
5. **RIGHTS OF SETTLERS—SWAMP LANDS SUITABLE FOR CULTIVATION.**—Under the amendment of 1899 (*Stats.* 1899, p. 182) swamp lands which are suitable for cultivation without reclamation can be sold only to actual settlers in tracts of one hundred and sixty acres. (*Id.*)

STATUTE OF LIMITATIONS.

1. **TRESPASS.**—Under subdivision 2 of section 338 of the Code of Civil Procedure, an action for trespass upon real property must be commenced within three years after the accruing of the cause of action. (*Williams v. Southern Pacific Railroad Company*, 624.)
2. **AMENDED COMPLAINT — DEMURRER — APPEAL.**—Where an amended complaint is filed after the cause of action has become barred by the statute of limitations, and a demurrer thereto is sustained on that ground, and judgment rendered for the defendant, the appellant who alleges error on the ground that the original complaint was filed before the cause of action had become barred must make that fact appear by the record. (*Id.*)

STATUTE OF LIMITATIONS (Continued).

3. **DAMAGES FOR PERMANENT TRESPASS—ACCRUAL OF CAUSE OF ACTION.**—Where an injury or trespass to land is of a permanent nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the injury is inflicted or the trespass committed, and an action therefor must be commenced within the statutory period after the doing of the wrongful act. (Id.)
4. **UNLAWFUL CONSTRUCTION OF RAILROAD—INJUNCTION.**—An action to recover damages for a wrongful entry by a railroad company upon the land of the plaintiff and the construction of its railroad thereupon, without proceedings for condemnation, and without plaintiff's consent, is barred if not commenced within three years after the entry; and the right to equitable relief by injunction against the continuance of the railroad is likewise barred at the same time. (Id.)
5. **WHEN FINDING UNNECESSARY.**—No finding on a plea of the statute of limitations is necessary to support a judgment against the defendant, where the admitted facts demonstrate that a finding thereon could not have been otherwise than against him. (*Bell v. Adams*, 772.)

See Insurance, 29-31; Mistake, 15.

STOCK AND STOCKHOLDERS. See Corporations.
STREETS, ROADS, AND HIGHWAYS.

1. **ACTION TO QUIET TITLE—DEDICATION OF PUBLIC STREET—PRESCRIPTION—CONFLICTING EVIDENCE—INTERRUPTION OF POSSESSION—SUPPORT OF FINDING.**—In an action to quiet title, involving a claim of prescriptive title to a street prior to an acceptance by the city defendant of a dedication thereof upon a recorded map, a finding against such title was sustained by proof that plaintiff's adverse possession thereof was interrupted by the superintendent of streets before the lapse of five years from the date of commencement of adverse possession, as shown by conflicting evidence for the defendant against the testimony of plaintiff to an earlier date. (*Goytino v. City of Los Angeles*, 367.)
2. **LOS ANGELES CHARTER—OPENING OF STREET UNDER GENERAL LAW—VOID PROCEEDINGS AND DEED.**—Proceedings to open and widen a street in the city of Los Angeles under the general law of March 6, 1889, instead of under the city charter, are void, and a deed thereunder executed by the superintendent of streets is a nullity. (*Baird v. Monroe*, 560.)
3. **LOT FRONTING ON STREET—PRIVATE EASEMENTS AS APPURTENANCES.**—Every lot fronting upon a street has as appurtenances thereto certain private easements in the street in front of and adjacent to the lot, which are part of the lot, and are private property as fully as

STREETS, ROADS, AND HIGHWAYS (Continued).

- the lot itself, though exercised in the street and extending into and over the street. (*Williams v. Los Angeles Railway Company*, 592.)
4. **NATURE OF PRIVATE EASEMENTS.**—The private easements appurtenant to the lot are: First, the right of ingress and egress to and from the lot over and by means of the street; second, the right to receive light from the space occupied by the street, and to the circulation of air therefrom; and, third, the right to have the street space kept open so that signs or goods displayed in and upon the lot may be seen by the passersby, in order that they may be attracted as customers. (*Id.*)
5. **OBSTRUCTION TO USE OF STREET—PRIVATE INJURY TO OWNER OF LOT—DAMAGES—INJUNCTION.**—Any obstruction to the use of the street, which impairs or destroys the private easements appurtenant to an abutting lot, is a private injury to the owner of the lot, different and distinct from the injury to the general public; and the owner may maintain an action for damages for the injury, or for an injunction to prevent its continuance, regardless of the fact that the same obstruction also constitutes an injury to the public right of travel, and regardless of the number of persons who may suffer a similar injury to private easements appurtenant to other lots fronting on the street. (*Id.*)
6. **ERECTION OF SWITCH-TOWER IN STREET—FRANCHISE FOR ELECTRIC RAILWAY—POWER OF CITY AUTHORITIES.**—The erection of a switch-tower on the street in front of plaintiff's lot, which is an obstruction to some extent to the exercise of the private easements of plaintiff, is not included in the granting of a franchise to lay tracks in the streets, and to run cars thereon by electricity, if it can be placed on private property, at whatever cost, and can there be used in substantially the same manner, and, if so, the city authorities cannot give the right to put it in the street, to the detriment of the private rights of the plaintiff, without first making compensation to him for the damage caused thereby, if any. (*Id.*)
7. **EXTENT OF DAMAGE—INJUNCTION PENDENTE LITE—GRANTING OR REFUSAL IN DISCRETION OF COURT.**—The question as to the extent or slighness of the damage caused by the obstruction, or whether it ought to justify an injunction *pendente lite*, was a matter for the determination of the trial court; and the question of granting or refusing an application for a temporary injunction was addressed to the discretion of the lower court, and its action in refusing it will not be disturbed on appeal, where there appears to be no clear abuse of discretion. (*Id.*)
8. **QUESTION FOR FINAL HEARING.**—If the damage or injury threatened is of a character which may be easily remedied, if the injunction is refused, as where it is chiefly monetary damage, and the defendant is solvent, the court, in its discretion, may refuse to issue a temporary injunction, leaving the question for the final hearing,

STREETS, ROADS, AND HIGHWAYS (Continued).

at which the court could allow compensation in the action, under the prayer for general relief, and could in the final judgment restrain the use of the tower, or command its removal, unless the damage was paid within a time fixed. (Id.)

See Ejectment, 6; Nuisance; Taxation, 2-4.

SUCCESSION. See Estates of Deceased Persons, 1-4.

SUPERSEDEAS. See Criminal Law, 4; Divorce, 2, 3.

SWAMP AND OVERFLOWED LANDS. See State Lands, 5.

TAXATION.

1. **ASSESSMENT OF COMMERCIAL VESSELS—REGISTRY AT DOMICILE OF OWNER.**—Vessels employed in foreign or interstate commerce, which had not by the manner of their use acquired an actual situs elsewhere, are properly assessed for taxation at San Francisco, the port of the domicile of their sole owner, where they are registered under the laws of the United States, regardless of the fact that they were outside of the waters of the State from a date preceding the first Monday in March in the year of the assessment and at the time of the assessment and collection of the tax, and that some of them had never been within its waters. (California Shipping Company v. City and County of San Francisco, 145.)
2. **VOID ASSESSMENT AND SALE OF STREET.**—An assessment of a portion of a public street is void, and creates no lien upon the land assessed; nor can a sale and conveyance by the tax-collector to the state for a delinquent tax thereupon transfer title to the state, nor would a grantee from the state acquire any right in the land, or by reason of such sale be authorized to close the street from use by the public. (Warren v. City and County of San Francisco, 167.)
3. **PAYMENT BY LOT-OWNER TO PREVENT SALE—PROTEST—CODE PROVISION INAPPLICABLE.**—A payment by a lot-owner abutting on the street but not on the part of the street assessed, made under protest, to prevent a sale of such part of the street, is not rendered involuntary by the protest under section 3819 of the Political Code, which provides merely that taxes paid under an illegal assessment by the owner of land under protest shall not be regarded as voluntary, and has no application to a payment by one who is not the owner of nor interested in the land assessed. The interest of the lot-owner in that part of the street was no different from that of any other proprietor whose lot bordered on any other part of the street. (Id.)
4. **VOLUNTARY PAYMENT WITH KNOWLEDGE OF FACTS—PRESUMPTION—ABSENCE OF COERCION—MONEY PAID NOT RECOVERABLE.**—The payment of the money by such lot-owner into the city and county

TAXATION (Continued).

treasury under protest, to prevent such sale, made with full knowledge of the facts and with presumed knowledge that the sale was made without any authority and created no lien, was voluntary and without compulsion or coercion, or any duress or threatened exercise of power over his person or property; and the money so paid cannot be recovered back by action against the city and county. (Id.)

5. **SALE—REDEMPTION—LAW IN FORCE AT TIME OF SALE—POWER OF LEGISLATURE.**—The law in force at the time of a sale for taxes regulates the right of redemption therefrom; and it is not within the power of the legislature to take away that right, or prejudicially to affect it, by subsequent legislation. (*Johnson v. Taylor*, 201.)
6. **LAW REQUIRING NOTICE TO COWNER—ABSENCE OF NOTICE—CHANGE OF LAW—INVALIDITY OF DEED TO STATE.**—Where the law in force at the time of a tax-sale required the purchaser or his assignee, within thirty days prior to the expiration of the time for redemption, or before a deed was applied for, to serve written notice upon the owner or occupant of such expiration or application, and to file an affidavit with the tax-collector showing such service, before a deed could be issued, and where the law was changed prior to the tax-deed dispensing with such notice, a deed made by the tax-collector to the state without such notice and affidavit passed no title thereto, and a subsequent deed by the state to a third party is void and cannot support an action to quiet title against the owners of the property. (Id.)
7. **DEED TO STATE—RECITALS—EXPIRATION OF TIME FOR REDEMPTION.**—A defect in a tax-deed to the state executed July 6, 1900, for land sold to it for delinquent taxes assessed for the year 1894, in failing to recite the time when the right of redemption had expired, was cured by the act of February 28, 1903, the purpose of which was to confirm, validate, and legalize certain tax-deeds. Such act is constitutional and valid. (*Carter v. Osborn*, 620.)
8. **ASSESSMENT OF PROPERTY SOLD TO STATE.**—A tax-sale to the state is not rendered void by reason of the fact that on the assessment-roll for the next ensuing year there was stamped the words "Sold to state," without a statement that it was "sold for taxes" and the date of the sale. (Id.)
9. **CERTIFICATE OF SALE—REPEAL OF SECTIONS 3776 AND 3777 OF POLITICAL CODE.**—Sections 3776 and 3777 of the Political Code, which provided for the issuance of a certificate upon the sale to the state for delinquent taxes, having been repealed by the act of 1895 (Stats. 1895, p. 19), the attempt afterward to amend the repealed sections by the Statutes of 1895, page 327, was of no effect. And a certificate, issued after the repeal of said sections, for delinquent taxes for the year 1894, will be disregarded in determining the validity of the sale. (Id.)

TAXATION (Continued).

10. **DELINQUENT TAX-LIST—OMISSION OF DOLLAR-MARK.**—In the delinquent tax-list, immediately under the heading "amount," were the figures "4 00,"—there being a space between the figure 4 and the two ciphers, as usually appears when they are intended to mean "dollars," but there was no dollar-mark. *Held*, that the delinquent list clearly indicated that dollars were meant, and that the absence of the dollar-mark did not invalidate the assessment or the tax-sale. (Id.)
11. **VOID DESCRIPTION OF LAND—DEED TO STATE—CLOUD ON TITLE—INJUNCTION.**—A description of land in an assessment-roll, as follows: "In the county of San Diego, state of California, . . . lot 1, block 17, Ocean Beach," is insufficient, and renders the assessment void; and an injunction will lie to restrain the county officers from executing a deed to the state for unpaid taxes based upon such assessment, by a description legally sufficient to charge the property, as such a deed, with the presumptions that it carries with it of the *prima facie* regularity of antecedent proceedings, would cast a cloud upon the title to the property, and result in injury to the owner. (San Diego Realty Company v. Cornnell, 637.)
12. **PAYMENT OF TAXES AS CONDITION TO INJUNCTION.**—Conceding such assessment to be void, and that nothing was due for taxes under it, the fact that the court, as a condition to the granting of the injunction, required the plaintiff to pay an amount found to be the just and legal amount for which the property could have been taxed, was without prejudice to the defendants. (Id.)
13. **POWER OF COURT TO DETERMINE AMOUNT OF TAXES.**—Where the amount of taxes, the value of the property, the tax-rate, and the amount due, had all been fixed by the proper fiscal officers, the court had power by its decree to determine that the amount so fixed was the just and legal amount of taxes due on the property, and to order its payment to the tax-collector as a condition to the granting of the injunction. If there could be any question of the general powers of a court of equity to render such a decree, there can be none as to its power in this state, under section 187 of the Code of Civil Procedure, which provides that whenever jurisdiction over any matter is conferred, all means necessary to carry the jurisdiction into effect are conferred with it. (Id.)
14. **ASSESSMENT OF CITY LOTS—FAILURE TO DESIGNATE CITY.**—Under subdivision 3 of section 3650 of the Political Code an assessment of land, as follows:—

"In Los Angeles County.		In Jefferson St.
City or Town Lots		
Lot	Block	
5	3	
6	3"	

which entirely fails to designate the city or town, and which is

TAXATION (Continued).

unaided by reference to any map, plat, or tract, is void, and all subsequent proceedings, and the deed made thereunder, are likewise void. (*Wright v. Fox*, 680.)

15. **PAYMENT UNDER PROTEST—INTEREST RECOVERABLE ONLY AFTER JUDGMENT.**—In an action to recover taxes paid under protest, under section 3819 of the Political Code, interest after payment and before trial is not allowable, and can only be allowed against the county and state from the time of the adjudication declaring the money due. (*Miller v. County of Kern*, 797.)
16. **AFFIDAVITS AUTHENTICATING ASSESSMENT-BOOK—FAILURE TO MAKE IN TIME LIMITED—DEFECT SUBSEQUENTLY CURED.**—A defect in an assessment, caused by the omission of the clerk of the board of supervisors and of the county auditor respectively to affix to the corrected assessment-book their affidavits, as required by sections 3682 and 3732 of the Political Code, within the time therein limited, is cured under section 3885 of that code as to a party assessed who pays his taxes under protest, by the making and affixing of such affidavits to the assessment-book prior to the payment of the taxes. The making and affixing of such affidavits are "acts relating to the assessment or collection of taxes," within the meaning of that section, which are not rendered illegal because the same were not completed within the time required by law. (*Id.*)
17. **NOTICE BY TAX-COLLECTOR.**—The fact that the tax-collector had given the notice to the taxpayers, as required by section 3746 of the Political Code, before the affidavits were attached, and gave no further notice after they were attached, did not affect the validity of the tax. The entire failure to give such notice would not make the tax invalid. (*Id.*)
18. **AUTHENTICATION OF ASSESSMENT-BOOK—DEFECT SUBSEQUENTLY REMEDIED—PAYMENT UNDER PROTEST—INTEREST.**—*Miller v. County of Kern*, ante, p. 797, affirmed to the effect that a defect in an assessment, caused by the omission of the clerk of the board of supervisors and of the county auditor, respectively, to affix to the assessment-book their affidavits, as required by sections 3682 and 3732 of the Political Code, within the time therein limited, is cured, as to a party assessed who pays his taxes under protest, by the making and affixing of such affidavits to the assessment-book prior to the payment of the taxes; and also to the effect that interest on taxes paid under protest is not recoverable for the time between the payment and the recovery of judgment. (*Kern Valley Water Company v. County of Kern*, 801.)
19. **CANAL SITUATED IN DIFFERENT SCHOOL AND ROAD DISTRICTS—ASSESSMENT.**—The assessment of a canal situated in more than one school district, and also in more than one road district, which does not show in what school districts and road districts it was thus situated, and in which the respective parts of the canal situated in

TAXATION (Continued).

the respective road districts were not separately assessed or otherwise designated, so that the tax due in each district could be ascertained therefrom, is invalid, and the tax levied thereon is void. (Id.)

20. **DEED TO STATE—PERIOD OF REDEMPTION NOT RECITED—INVALIDITY—CURATIVE ACT.**—Under the law as it stood prior to the curative act of 1903 a deed to the state for delinquent taxes not containing a recital of the time allowed for redemption was void; but that curative act had the effect to legalize deeds theretofore made not containing such recital, provided five years have elapsed since the date of the sale and deed. (*Baird v. Monroe*, 560.)
21. **CONSTRUCTION OF CURATIVE ACT—RETROACTIVE EFFECT.**—The rule that a statute should not be construed to operate retroactively unless the legislative intention that it should so operate is clearly apparent cannot apply where it is essentially a curative act, intended to give effect to past transactions which are ineffective because of neglect to comply with some requirement of law. (Id.)
22. **CONSTITUTIONALITY OF ACT.**—The curative act of February 28, 1903, is not a "local or special law" within the prohibition of subdivisions 14 or 18 of section 25 of article IV of the constitution, being a general law, applicable to all certificates and deeds having the defects stated. Nor does it operate to deprive the property-owner of his property "without due process of law," since it is his failure to redeem within the time fixed by law, after "due process of law" to enforce delinquent taxes, that deprives him of his property, the defect cured being in a merely formal matter, not affecting the substantial rights of the taxpayer. (Id.)
23. **CERTAINTY AS TO AMOUNT OF SALE.**—A recital as to the amount for which the property was sold which shows the total amount due for taxes, penalties, costs, and charges at the time of the sale, is sufficiently certain. (Id.)
24. **DESCRIPTION OF PROPERTY ASSESSED—USE OF ABBREVIATIONS—REFERENCE TO TRACT NAMED—PRESUMPTION—KNOWN EXTENT OF BOUNDARIES.**—The description of property assessed as being "in Los Angeles County," in "Pellissier Tr.," and as "Lot 5" in "Block K," sufficiently shows that the property assessed is Lot 5 in Block K in the Pellissier Tract in Los Angeles County. The use of abbreviations is permissible if thereby the property may be easily known; and the court might presume in the absence of proof to the contrary that there was but one such tract in the county, and that the tract and the extent of its boundaries are well known by that name. (Id.)
25. **STIPULATION AS TO RECORDED MAP—PROPERTY SUFFICIENTLY IDENTIFIED.**—Where there was a stipulation as to a recorded map of the "Pellissier Tract" designating with certainty the property referred to in the assessment, it is to be taken as meaning that there is but

TAXATION (Continued).

- one such map, and the property is sufficiently identified by means thereof. It was permissible to show, in aid of the description, that it was in fact sufficient to identify the land, and to show the recorded map of that tract for that purpose. (Id.)
26. **DESCRIPTION OF CITY LOTS—ALTERNATIVE DESCRIPTION.**—It is not essential to the validity of an assessment of a city lot that the description of the lot complies with the requirements of subdivision 3 of section 3650 of the Political Code. The assessor is authorized to assess the same under subdivision 2, if he so desires, using any description which is sufficient to identify the property assessed. (Id.)
27. **DESIGNATION OF SCHOOL AND ROAD DISTRICT.**—Where the name of the school and road district were the same and were known by the name of "Rosedale," it was sufficient to place the name partly in one column and partly in the other, thus: "Ros | edale." (Id.)

TITLE TO LAND.

1. **ACT TO ESTABLISH LAND TITLES—LOSS OF RECORDS—PURPOSE OF STATUTE.**—The act of June 16, 1906, providing "for the establishment and quieting of title to real property in case of the loss or destruction of records," was intended to provide a method whereby owners in possession of real estate in counties where the records are destroyed to such an extent as to make it impossible to trace a title of record may secure a decree which shall furnish a publicly authenticated title. (The Title and Document Restoration Company v. Kerrigan, 289.)
2. **NECESSITY FOR TITLE OF RECORD.**—It is practically essential, under our system of registration, to the security of ownership in real property that there should exist some method by which the title may be made clear of record, since a title which cannot be traced and established by some form of public record is practically unmerchantable. (Id.)
3. **JUDICIAL NOTICE—RELIANCE UPON RECORDS.**—In this country the system of registration has become so completely established that the courts can take judicial notice that in the great majority of cases parties dealing with real estate rely for proof of their titles upon the chain of title that will be disclosed by an examination of the records, and in a small degree, if at all, upon the possession of the original instruments composing that chain. (Id.)
4. **COMMON KNOWLEDGE AS TO LOSS OF RECORDS IN SAN FRANCISCO—NECESSITY TO SECURE EVIDENCE OF TITLE.**—It is matter of common knowledge that in the city and county of San Francisco there has been so great a destruction of the public records as to make it impossible to trace any title with completeness or certainty. Some provision was clearly necessary to enable holders and owners of real estate in this city to secure such evidence of title as would enable

TITLE TO LAND (Continued).

them to defend their possession and to enjoy the equally important right of disposition. (Id.)

5. **CONSTITUTIONALITY OF ACT—CONSIDERATIONS EMPHASIZING PRESUMPTION OF VALIDITY.**—Considerations as to the real scope and purpose of the act, though not affording any ground for disregarding constitutional provisions, yet serve to emphasize the rule that in passing upon the constitutionality of a law every presumption and intendment in favor of the validity of the enactment are to be given effect. (Id.)
6. **DUE PROCESS OF LAW—PROCEEDING IN REM OR QUASI IN REM.**—The act in question does not deprive any person of property without due process of law. The action does not differ in character from the action to determine heirship, which is a proceeding *in rem*. In any view the proceeding contemplated by the act is quasi *in rem*, merely to affect the interest of the defendant in specific real property within the state which has at the outset of the proceeding been brought within the control of the court. The constitutional requirement as to such action is satisfied by a substituted service of summons as to defendants not found within the state. (Id.)
7. **DUE PROCESS IN ACTION TO QUIET TITLE—JURISDICTION OF CHANCERY IN PERSONAM—POWER OF LEGISLATURE.**—While in the exercise of its inherent equity jurisdiction in an action to quiet title a court of chancery acts only *in personam*, it is competent for the legislature, so far as the constitutional provision regarding due process of law is concerned, to confer upon courts of equity an extended power, so as to permit the court to bind the interest of persons in real property so far as that property alone is concerned, even though the defendant may not have been personally served with process within the state. (Id.)
8. **DUE PROCESS AS TO KNOWN CLAIMANTS.**—So far as the rights of known claimants are concerned, who cannot be personally served with summons by reason of non-residence, the service by posting, publication, and mailing, and the naming of them in the memorandum appended to the summons, and in the affidavit required by the act to be served upon them, and notifying them when to appear, constitute due process of law; and the fact that they are not named in the complaint and body of the summons is immaterial. (Id.)
9. **DUE PROCESS AS TO UNKNOWN CLAIMANTS.**—The notice to unknown claimants, by posting the summons describing the nature of the action, the property involved, the name of the plaintiff, the relief sought upon the property, and its publication in a newspaper for two months, and the record of the notice of *lis pendens*, is as complete and full as from the nature of the case could reasonably be expected, and constitutes due process of law as to them. (Id.)
10. **METHOD OF PROCEDURE AS TO UNKNOWN CLAIMANTS—COMMON LAW—POWER OF LEGISLATURE.**—The fact that the procedure known to

TITLE TO LAND (Continued).

the common law cuts off the rights of unknown claimants only by failure to assert them within a limited period is not a sufficient objection to the procedure prescribed by the act as to unknown claimants. The legislature may prescribe novel and unprecedented methods of procedure, provided they afford the parties affected substantial securities against arbitrary and unjust spoliation, which are embraced within the system of jurisprudence prevailing throughout the land. (Id.)

11. **NECESSITY OF SETTLING TITLES AS TO UNKNOWN CLAIMANTS.**—The power of the state to settle titles within its borders and to allow a substituted service should not be limited to known claimants who cannot be served; but in order to exercise this power to the fullest extent it is necessary that it should be made to operate on all interests, known and unknown. A proceeding to settle titles against all the world necessarily involves getting rid of unknown claimants, and such claimants cannot be dealt with by personal service. (Id.)
12. **CONSTRUCTION OF STATUTE—REASONABLE DILIGENCE REQUIRED TO DISCOVER ADVERSE CLAIMANTS—MEANS OF KNOWLEDGE.**—The statute must be construed as requiring the exercise of reasonable diligence on the part of the plaintiff to discover adverse claimants, and when discovered to make them parties defendant; and the means of knowledge in this respect must be deemed equivalent to actual knowledge. The plaintiff is under the duty of inquiry as to the names and residences of all persons who may claim an adverse interest. So construed, the statute does not, nor can an action prosecuted under it, deprive any person of his property without due process of law. (Id.)
13. **PROCEEDINGS JUDICIAL AND NOT ADMINISTRATIVE.**—The proceeding to establish title of record under the act is judicial, and not administrative, in its nature. Whenever the law confers a right and authorizes an application to a court of justice to enforce that right, the proceedings upon the application are judicial in their nature; and it is immaterial whether, in response to the notice given to all claimants, known and unknown, there is or is not any appearance to contest the right. (Id.)
14. **SPECIAL LEGISLATION—REGULATING PRACTICE OF COURTS.**—The fact that the act in controversy makes provisions regulating the practice in the actions therein provided for, which are not to be found in other judicial proceedings, does not necessarily make it special legislation forbidden by subdivision 3 of section 25 of article IV of the constitution, prohibiting the passage of special laws "regulating the practice of courts of justice." The proceeding created by the act is sufficiently distinct and different from ordinary civil actions covered by the general rules of the code to justify the creation of a class of actions characterized by the special rules of procedure provided for in the act. (Id.)

TITLE TO LAND (Continued).

15. **DESTRUCTIVE AGENCY SPECIFIED.**—The statute is not special legislation merely because it enumerates destruction of records by earthquake, fire, or flood. The three agencies named are those which are most likely to occur in this state, and are the only ones which, so far as we know, have caused any considerable destruction of public records. These facts furnish ample ground for limiting the operation of the act to the cases to which it has been made applicable. (Id.)
16. **SUFFICIENCY OF TITLE.**—The title of the act sufficiently complies with section 24 of article IV of the constitution. (Id.)

TRADEMARK. See Injunction, 3, 4.

TRESPASS. See Statute of Limitations, 1-4.

TRUST.

1. **CONSTRUCTIVE TRUST—DEED FROM PARENTS TO DAUGHTER—PROMISE WITHOUT INTENT TO PERFORM.**—A deed made by parents to their daughter, in whom they reposed full confidence, solely upon the conditions and in consideration of her promises to pay the balance of a mortgage on the land conveyed, and that the grantors should have and retain the premises as their home as long as the mother lived, which latter promise was made by the grantee without any intention of performing it, is obtained by fraud, and under such circumstances the law raises a constructive trust in favor of the grantors. (*Crabtree v. Potter*, 710.)
2. **PAROL EVIDENCE OF CONSTRUCTIVE TRUST.**—Parol evidence is admissible to establish such a constructive trust. Section 852 of the Civil Code, declaring that a trust in lands can only be created by an instrument in writing, has no application to constructive trusts. (Id.)
3. **TRUST-DEED—CONSTRUCTION—PAYMENT OUT OF PROCEEDS OF LANDS SOLD—DILIGENCE OF LAND COMPANY—FORECLOSURE—FINDING OF NEGLIGENCE.**—The provision in a trust-deed to secure creditors that they should be paid only out of the proceeds of sales by a land company party thereto, at not less than certain minimum prices, is to be construed with its undertaking to use reasonable diligence in placing the lands upon the market and in making sales thereof, and the trust-deed cannot be construed as intending that the land company by violating its agreement could indefinitely postpone the right of the creditors secured to obtain payment out of the lands; and upon foreclosure by the creditors, where the court finds that the land company was negligent in its required duty to make sales, it will equitably subject the lands to the payment of the creditors by a judicial sale, without reference to the performance of the condition. (*Earle v. Sunnyside Land Company*, 214.)

TRUST (Continued).

4. **ABSENCE OF PERSONAL LIABILITY—"LIEN SECURITY."**—The absence of the personal liability of the land company will not affect the foreclosure of the security, where by the terms of the instrument a "first-lien security" was provided for in favor of the trust company for the repayment of all advances by it; and the payment through it of unpaid purchase money due from the land company to its vendors was thereby secured. (Id.)
5. **PROVISION FOR "MINIMUM PRICES"—BENEFIT OF CREDITORS—POWER OF LAND COMPANY TO FIX PRICES NOT ARBITRARY.**—The provision in the deed of trust for "minimum prices" was inserted for the benefit of the creditors secured, and is a restriction upon the right of the land company to sell at prices to be fixed by it according to its pleasure. Such right, however, is to be read with its covenant to use reasonable diligence to make sales, and in the light of the general purposes of the trust agreement; and cannot be construed as an arbitrary and unfettered power to fix prices which would make sales impossible, and indefinitely prevent the accomplishment of the purposes of the trust. (Id.)
6. **SUBROGATION OF CREDITOR TO ORIGINAL MORTGAGE-LIEN—FORECLOSURE FOR RESIDUE—FIRST LIEN.**—Where there was an original mortgage upon the lands sold to the land company, which a bank at the request of the land company had advanced the money to discharge, to which security it was agreed that the bank was subrogated and had a "first lien" upon the property, to the unpaid residue of which the plaintiff had succeeded, he is entitled by subrogation to enforce a "first lien" for the residue out of the unsold lands. His rights are unaffected by the fact that the security for the bank passed through the hands of the trust company. (Id.)
7. **VALIDITY OF TRUST—EQUITABLE LIEN—FORM OF SECURITY NOT MATERIAL.**—Regardless of the question of the validity of the deed of trust under section 857 of the Civil Code, the instrument may be sustained as an equitable mortgage or lien in favor of the creditors secured, which is enforceable as such. The form of the writing is not important provided it sufficiently appears that it was thereby intended to create a security. (Id.)
8. **FORECLOSURE OF LIEN—SALES AT "MINIMUM PRICES" NOT REQUIRED—POWER OF COURT.**—Upon the foreclosure of the equitable lien of the creditors the judgment is not required to direct that the sale of the lands be made at the "minimum prices" set forth in the trust agreement. That provision fell with the provision authorizing the company to make the sales, when by reason of its neglect to make sales the land company produced a condition which authorized a court of equity to take the security into its own hands, and the court was authorized to direct a sale in any just and equitable manner. (Id.)

TRUST (Continued).

9. CONSTRUCTION OF DECREE AS TO TRUST COMPANY—SUPPORT OF FINDINGS.—Regarding the decree as an entirety, it is held to be intended to provide that sums due to the trust company individually should be deducted from the total sum to be received by it as trustee from the proceeds of judicial sales of the land, and to follow the findings in that respect. (Id.)

See Mistake, 1-6, 11, 13; Partnership, 2, 3; Wills, 6.

UNFAIR TRADE. See Injunction, 3, 4.

VENDOR AND VENDEE.

1. VENDOR AND VENDEE—COVENANT TO DELIVER ACTUAL POSSESSION.—A written contract for the sale and purchase of real estate by the terms of which the vendor agrees to sell the land to the vendee for a specified sum and "to deliver" the same by a specified date, and the vendee agrees "to take" the land and pay the specified sum, imposes the obligation on the vendor to put the vendee in the actual physical possession of the land, and until such possession is tendered the vendee is not in default. (Pierce v. Edwards, 650.)
2. LAND IN POSSESSION OF TENANTS—WRITTEN CONTRACT CANNOT BE VARIED BY CONTRADICTORY ORAL UNDERSTANDING—PLEADING.—In an action by the vendor to recover damages for the breach of such contract, allegations in the complaint that the writing was not intended to and did not embrace all the details of the contract, and that it was agreed between the parties as a part of the contract that the tenants on the land should remain and become tenants of the vendee, must be construed most strongly against the pleader, and it must be inferred that the land was in the possession of tenants and that an actual delivery thereof was not tendered to the purchaser. The facts so alleged did not obviate the necessity of an actual delivery of possession by the vendor, as the written contract, expressly requiring such delivery, could not be added to or varied by a contemporaneous oral understanding in direct contradiction thereof. (Id.)
3. AGREEMENT OF TENANT TO ATTEST TO PURCHASER.—In such action an allegation by the vendor, that at the time of the contract the premises were leased to a designated person, "who consented and agreed to and with the vendee to become and be the tenant of the vendee on said premises," is not sufficient to avoid the necessity of an actual delivery of possession by the vendor, there being no allegation that such agreement of the tenant was a part of the contract between the vendor and vendee, or that the purchaser agreed to accept such person as her tenant; and the vendor, not being a party to such agreement, cannot take advantage of it for the purpose of relieving himself from the failure to perform the stipulations of his contract. (Id.)

VENDOR AND VENDEE (Continued).

4. **KNOWLEDGE BY PURCHASER OF POSSESSION BY TENANTS.**—The fact that the purchaser knew at the time of the contract that the land was in the possession of tenants cannot be considered in construing the contract so as to make the obligation to deliver merely an obligation to deliver the land in the condition in which it was,—that is, as subject to lease and in the possession of tenants. (Id.)

VENUE. See Place of Trial.

VESSELS. See Taxation, 1.

WATER AND WATER-RIGHTS.

1. **WATER-RIGHTS—CONVEYANCE OF LAND—APPURTENANT RIGHT—SUBSEQUENT DIVISION AND AGREEMENT—RIGHT TO DISPOSE OF SURPLUS WATER.**—Where the owner of a farm having a water-right, for the purpose of irrigating the farm and disposing of the surplus water to other farms, sold and conveyed a part of the farm and a proportionate share of the water-right, with the right to convey the water across lands of the grantor to the lands of the grantee, and they subsequently divided the water by agreement, by means of flumes, so as to give an increased flow to the grantee, by the terms of which agreement they agreed to convey to each other the right to receive and use all the water that might flow in their respective flumes and ditches, and to share the proportionate expense of the main ditch to the point of diversion, and that the grantee's right should be appurtenant to his lands, as a part thereof, and for the benefit of said lands,—the grantee has the right to dispose of the use of any surplus water flowing through his flume and ditch to owners of adjoining lands when not needed for full use on his own land. (*Calkins v. Sorosis Fruit Company*, 426.)
2. **CONSTRUCTION OF AGREEMENT—"APPURTENANT"—"BENEFIT OF LAND."**—The effect of the agreement making the water-right of the grantee "appurtenant to his lands," and "for the benefit of said lands," merely embodies the legal definition of an "appurtenance" to land given in section 662 of the Civil Code, making a thing "appurtenant to land when it is by right used with the land for its benefit," and the expression "for the benefit of said lands" merely couples with the word "appurtenant" its legal definition. (Id.)
3. **COVENANT OF GRANTOR TO GRANTEE AND SUBSEQUENT OWNERS ONLY.**—A covenant binding the grantor to the grantee and all subsequent owners of wide bottom lands, through which a river flows, lying at all have the effect to limit the grantee's use of the waters secured to him to his own lands exclusively, but is merely intended to prevent a transfer of the whole body of the water-right to any third person apart from a sale of the land. (Id.)

WATER AND WATER-RIGHTS (Continued).

4. **RIGHTS OF GRANTOR NOT INFRINGED—ACTION BY GRANTEE TO DETERMINE RIGHT TO USE OF SURPLUS WATER.**—No rights of the grantor were infringed by the disposition by the grantee of the surplus water flowing in his flume and ditch; and where the grantor has wrongfully interfered therewith, and claimed the right to sell all surplus water, the grantee may maintain an action to have his rights to dispose of the use of his own surplus water determined. (Id.)
5. **SPECIAL DAMAGES—INSUFFICIENT PROOF—LIMIT OF NEW TRIAL.**—The grantee has the right to recover special damages arising from the interference by the grantor with the grantee's right of disposition of surplus water, if clearly proved; but it is held that the proof is insufficient to show the amount of special damages awarded, and that a new trial must be granted on that issue only. (Id.)
6. **RIPARIAN RIGHTS—BOTTOM LANDS ON EACH SIDE OF RIVER.**—The owners of wide bottom lands, through which a river flows, lying between high lands or bluffs on each side, have riparian rights therein. (Anaheim Union Water Company v. Fuller, 327.)
7. **LAND BEYOND WATERSHED.**—Land which is not within the watershed of the river is not riparian thereto, and is not entitled, as riparian land, to the use or benefit of the water from the river, although it may be part of an entire tract which does extend to the river. (Id.)
8. **UNION OF STREAMS—LANDS ABOVE JUNCTION.**—Where two streams unite, each, in regard to riparian rights, is to be considered a separate stream respecting lands abutting thereon above the junction, and land lying within the watershed of one stream above that point is not to be considered as riparian to the other stream. The facts that the streams are of different sizes and that both of them lie in one general watershed or drainage basin, and that they are separated by the summit or crown of a comparatively low tableland, do not change this rule. (Id.)
9. **LOSS OF RIPARIAN RIGHTS—CONVEYANCE OF NON-ABUTTING LAND.**—If the owner of a tract of land abutting on a stream conveys to another a non-contiguous part of the tract, he thereby cuts off the part conveyed from all participation in the use of the stream and from riparian rights therein, unless the conveyance declares the contrary. Land thus severed from the stream can never regain the riparian right, though subsequently reconveyed to an abutting owner. (Id.)
10. **CONTIGUITY OF NON-ABUTTING LAND TO UNDERGROUND FLOW.**—The contiguity of land which does not abut on the surface stream of the river to the underground flow or percolation of the stream does not carry with it the right of the owner to divert water from the surface stream and transport it to his land across intervening land, to the injury of lands which abut on the proper banks of the surface

WATER AND WATER-RIGHTS (Continued).

- stream, even though such non-abutting land is within the watershed. (Id.)
11. **INJUNCTION AGAINST IMPROPER DIVERSION OF STREAM—ACTUAL DAMAGE IMMATERIAL.**—A lower riparian proprietor may enjoin an improper diversion of the stream above him by non-riparian owners, which operates as a legal injury to his rights, without being required to make any showing of present actual damage. It is sufficient to support the injunction that the unlawful diversion may by lapse of time grow into an adverse right. (Id.)
 12. **RIPARIAN RIGHTS—BEGINNING AND EXTENT.**—A riparian right is limited to the riparian land, and begins only when the water reaches the riparian land. The riparian owner has the right to use the water as it passes his land for domestic purposes thereon, and to take out a reasonable portion thereof for the irrigation of his abutting land; and for the protection of this right, beginning when the water reaches his land, he has the right to insist that the water above his land shall not be polluted to his injury, nor diminished by other riparian owners above so as to deprive him of his just portion, and perhaps, as to other than riparian owners, the right to prevent any substantial diminution of the amount of the water which would naturally flow to his land. (*Duckworth v. Watsonville Water and Light Company*, 520.)
 13. **LAND ON OUTLET OF LAKE—RIGHT LIMITED TO WET SEASON—CONVEYANCE.**—A riparian owner has no title in the water of a stream before it reaches his land; and an owner of land not abutting on a lake, but only on an outlet thereof, through which water naturally flows from the lake to his land only in the wet season, has no riparian right in the lake or in pools standing above his land from which there is no natural flow to his land in the dry season; and he can convey no riparian right other than that which he owns upon the outlet to the lake, when water naturally flows therein. No one can sell or convey to another that which he does not own. (Id.)
 14. **CONVEYANCE OF RIPARIAN RIGHTS—RESERVATION—SUBSEQUENT CONVEYANCE OF LAND TO PLAINTIFFS.**—Where long prior to the conveyance to plaintiffs of lands riparian to a lake and its tributaries, their grantor had made conveyances to the grantors of defendant water company of all waters and water-rights pertaining to the land, reserving only sufficient water for domestic use and watering stock thereupon, the subsequent conveyance of the land to plaintiffs conveyed only such reserved water-right as an appurtenance thereto. (Id.)
 15. **USE OF RESERVED RIGHT NOT ADVERSE.**—The use of the reserved right of water sufficient for domestic use and for the watering of stock by plaintiffs and their grantor was not adverse to the rights of the defendant water company to the water-rights in the lake acquired under such grantor. (Id.)

WATER AND WATER-RIGHTS (Continued).

16. **APPROPRIATION OF WATER—STREAM FLOWING INTO LAKE.**—Where a stream flows into a lake a valid appropriation of water may be made either from the stream or from the lake in which the stream terminates, and which constitutes a part of it; and where a water company holds all the waters of the lake, except that which was reserved, and with which it does not interfere, it may appropriate the water and take it to non-riparian lands to be used thereon for irrigation. (Id.)
17. **ESTOPPEL OF GRANTEES.**—The plaintiffs as grantees from the common grantor, who had conveyed to defendants' grantors all waters of the lake other than the right reserved; are estopped by the deeds under which the water company claims from contending that the rights conveyed were only riparian, and that the appropriation by the water company is inconsistent therewith, no rights granted having been regained by adverse possession. (Id.)
18. **APPROPRIATION BY PLAINTIFF—CONTEST OF DEFENDANTS—APPROPRIATION.**—A plaintiff is not estopped by such deed from making a subsequent appropriation of the water, and contesting the validity or effect of the appropriation made by the water company. (Id.)
19. **PLEADING—CROSS-COMPLAINT—INSUFFICIENT DENIAL—ADMISSION.**—Where the water company, as defendant, did by way of cross-complaint allege that it "is the owner and entitled to the exclusive use of all the waters of the lake," an answer thereto, denying that the water company is or has been "the owner and entitled to the exclusive use of all the waters of the lake," is insufficient and constitutes an admission that the water company is entitled to substantially all of the water. (Id.)
20. **RIGHT OF APPROPRIATION NOT CONFINED TO PUBLIC LANDS.**—The right to appropriate water under the provisions of the code is not confined to streams running over public lands of the United States; but it exists wherever the appropriator can find the water of a stream not appropriated and in which no other person has or claims superior rights and interests. (Id.)
21. **EFFECT OF APPROPRIATION.**—The effect of an appropriation under the statute, when completed, is that the appropriator thereby acquires a right superior to that of any subsequent appropriator in the same stream; but he acquires thereby no right whatever as against rights existing in the water when the appropriation was begun, unless it has been continued adversely for a sufficient time to obtain a prescriptive title, and then only to the extent of the use. The amount claimed in the notice is no measure of the right. (Id.)
22. **RIGHTS OF PRIOR APPROPRIATOR AND RIPARIAN OWNER—DECREE QUIETING TITLE.**—A prior appropriator who is also a riparian owner is entitled to a decree quieting his title against a subsequent appropriator whose rights are subordinate thereto. (Id.)

WATER AND WATER-RIGHTS (Continued).

23. **EFFECT OF USE UPON RIPARIAN RIGHT.**—A riparian right is neither gained by use nor lost by disuse; and the fact that the prior appropriator had not used the riparian right appurtenant to its land cannot affect the right of the owner thereof to have his title quieted thereto as against a subsequent appropriator, though such riparian right does not exist except for beneficial use upon the land to which it attaches. (Id.)
24. **RIGHTS OF SUBSEQUENT APPROPRIATOR TO SURPLUS—PROTECTION OF PRIOR APPROPRIATOR.**—An appropriator is entitled only to the water actually taken and used, and a prior appropriator is not entitled to prevent a subsequent appropriation and use of any surplus water, if any exists. But the prior appropriator may insist upon a reasonably ample quantity to last through the entire season until rains renew the supply, and may enjoin any depletion of the supply which will so lower the water surface as to substantially increase the cost of making the diversion which the prior appropriator is entitled to make. (Id.)
25. **SUFFICIENCY OF NOTICE.**—A notice of appropriation stating that the water claimed is to be used for irrigation upon certain described land belonging to the appropriator's wife is not vitiated by an additional statement that it may be used for irrigation by other parties whose lands are not described. A statement that the water is to be conveyed to the place of use "by a six-inch pipe or by a pipe of other dimensions" is sufficient to authorize a diversion of the quantity that could be carried in a six-inch pipe, not exceeding the quantity claimed as the maximum. (Id.)

See Damages.

WAY. See Evidence.

WILLS.

1. **VOID DEVISE TO CHARITABLE SOCIETY.**—Under section 1313 of the Civil Code a devise to a charitable society, made less than thirty days before the decease of the testator, is void. (Estate of Russell, 604.)
2. **COMMON-LAW RULE ABROGATED—VOID DEVISE—TITLE OF HEIRS—RESIDUARY DEVISE.**—The common-law rule, that a devise of real property speaks as of the date of the will, is abrogated by section 1332 of the Civil Code, providing that "A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will," and an invalid or ineffectual devise of real property in this state does not pass to the heirs, but must go to the residuary devisee, unless a contrary intent is clearly expressed by the terms of the will. (Id.)

WILLS (Continued).

3. **DEVISE OF LIFE ESTATE SUBJECT TO CHARGE.**—A will which devises certain lands to the grandchildren of the testatrix with the proviso that their respective mothers, who were the daughters of the testatrix, should have "the full control and possession and all rentals and income of the lands willed to their children during their natural lives, except that each one shall every year put out one hundred dollars at interest (to be divided between her two children), until her youngest child attains the age of twenty years," creates a life estate in each of the respective mothers as to the land devised to the grandchildren, subject only to a charge of one hundred dollars per annum, or fifty dollars each, in favor of their respective children, until the youngest child attains the age of twenty years, and subjects the devise to the grandchildren to the estate for life in the mothers. (Estate of Haines, 640.)
4. **DIRECTION FOR ACCUMULATION OF INCOME—SUSPENSION OF POWER OF ALIENATION.**—By the provision for the benefit of the children it was intended that each child was to have, so long as he or she lived, until the youngest child attained the age of twenty years, or would have attained that age if living, the sum of fifty dollars per annum out of the life interest given to the mother, and that these sums were to be invested for his or her benefit and remain at interest during that period. To the extent stated, it is an attempted disposition of the income of the real property, and a direction for the accumulation thereof. So construed, there is no forbidden suspension of the absolute power of alienation, as such suspension is permitted for a period not longer than during the continuance of lives of persons in being at the creation of the limitation or condition; and in the case of each child, the trust for accumulation cannot continue longer than during the life of the designated beneficiary in being at the time of the creation of the trust. (Id.)
5. **PERIOD FOR ACCUMULATION OF INCOME LIMITED TO MINORITY OF BENEFICIARY.**—Under section 724 of the Civil Code, providing that the accumulation cannot be for a longer term than the minority of the beneficiary, and section 725 of the same code, providing that if the direction for accumulation is for a longer term, "the direction only, whether separable or not from other provisions of the instrument, is void as respects the time beyond such minority," the direction for accumulation here should be held valid in the case of each child for the period of his or her minority, and void as respects the time beyond such minority. (Id.)
6. **TRUST DURING MINORITY OF BENEFICIARY.**—A provision in the will that "All moneys, notes &c. which I may have to be divided between my two children and four grandchildren, and my daughters to have exclusive control of their children's money and invest it as they think best until they, the children, become of age," creates a valid trust, as to the share of each grandchild, in his or her

WILLS (Continued).

mother, to continue during his or her minority, and the bequest of the property is subject to such trust. (Id.)

See Estates of Deceased Persons, 5-10.

WRIT OF ASSISTANCE. See Mortgage, 6-8.

WRIT OF ERROR. See Criminal Law, 4.

